American Bar Association Journal

October, 1977

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LAWSCOPE

News of the Law and Legal Profession
LawScope begins on page 1361

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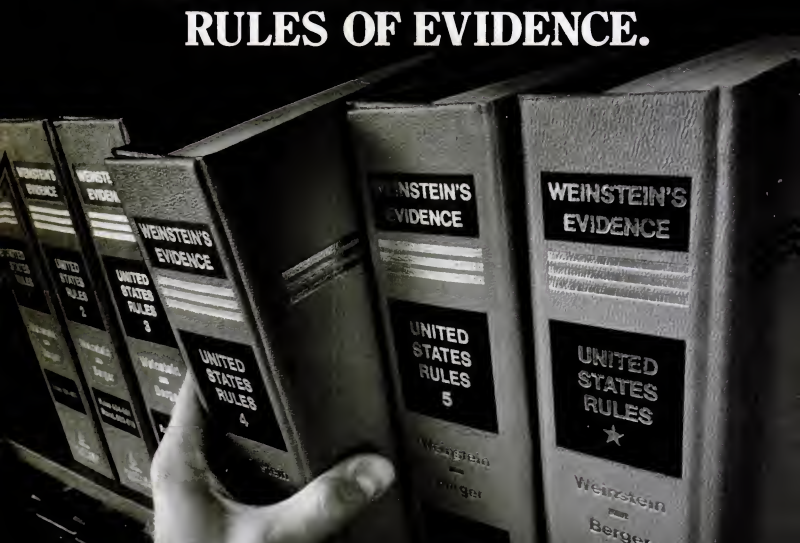

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President's Page

Wm. B. Spann, Jr.

IN THE PAST few years, you probably have heard and read a great deal in this forum and others about the delivery of legal services. This is the result of the creation of several substantive programs related to improving the delivery of legal services to the American public by the American Bar Association. The range of issues and programs related to delivery problems is very broad because delivery is essentially what our profession is all about. Sometimes we forget that issues such as advertising, specialization, lawyer referral, minor dispute resolution, and many more are simply different facets of the over-all question of how the practice of law is organized for delivery of our services to the public.

To some, the development of several disparate programs to deal with delivery issues must have appeared as simply a haphazard response by the bar to newly perceived needs and pressures in this area. But it has been an important time in which the organized bar has uncovered some important facts, reached some definite conclusions, and formalized its philosophical approach to delivery problems.

To me, the most salient fact to be considered in approaching delivery questions is the economic position of American households. Of American families, 85 per cent have a money income of less than $25,000 a year, and about 60 per cent have a money income of less than $15,000 a year. These statistics point out that the overwhelming majority of citizens in this country have low or moderate means of income.

For the indigent, our society has already moved to provide some form of legal assistance. Through funding from the Legal Services Corporation and other sources, legal aid offices are available in most communities to help meet the legal needs of the nation's poor. Although the level of funding for legal services for the poor is still inadequate, what is most important is that some mechanism has been set up to meet the legal needs of America's poorer citizens. No such system exists for the middle-income group. While we continue our efforts to improve the legal services available to the nation's indigent, we must now act to ensure that families of moderate income can obtain necessary legal services.

The second fact to be considered in the delivery area is that the social organization of our society is vastly different in the latter half of the twentieth century than it was earlier in the nation's history. Most Americans now live in large metropolitan areas. The urbanization of American society has meant that more and more legal problems befall people in groups rather than as individuals. Mass marketing, large-scale employers, standardization of consumer and other transactions, mass exposure to physical and esthetic pollution all cause legally significant events that affect people, not as isolated individuals, but as members of groups. Yet the practice of law still remains largely oriented toward the individual consumer of legal services.

The third basic fact to be considered is that a lawyer's time is very valuable. This is attributable to many well-known factors. It is important to stress to the public that often lawyers' fees are high because he has a substantial financial commitment in attending law school, paying the overhead and expenses of his office, and not being able to charge for much of the time expended in client services. Therefore, when an hour is billable, he must set a rate which will cover all of these other factors. It is also an economic fact of life that there are many other well-paying endeavors a lawyer can enter. Lawyers have skills that can be employed in such areas as business, finance, and public administration at compensation levels comparable to what the average lawyer earns from practice.

These economic considerations of the practice of law have meant that often cases simple enough to be within the client's means are generally not worth a lawyer's time; cases complicated enough to justify a lawyer's involvement are beyond the client's means except when a contingent fee arrangement is feasible or when the cost is externally underwritten, as with a prepaid insurance plan. The average American therefore limits legal services to such items as wills, deeds, and divorces. For many important and serious problems involving tenancy, consumer grievances, or conflicts with government agencies, the vast majority of Americans simply do not use a lawyer because they don't know how to find one and feel they cannot afford one.

Considering all of this, I have come to the conclusion that when we are talking about ways to improve the delivery of legal services, we are really talking about ways in which the profession could reach a *potential* market for legal services. This means that if delivery mechanisms were altered, there would be no serious damage to the practice of the vast majority of private lawyers and that the public would be well served because those now without legal services would be able to obtain them.

But how should the practice be changed to reach this potential market? Before we can answer that question, there must be a consensus about the approach to the problem. The Association believes we should strive to improve the delivery of legal services through private market arrangements, which have traditionally characterized our profession. There will continue to be a need for publicly subsidized legal services through such entities as the Legal Services Corporation. But the primary aim

(Continued on page 1478)

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American Bar Association Journal

Editorial Opinion & Comment

Association Governance

MORE THAN forty years have passed since the American Bar Association was reorganized in 1936 with a structure that has enabled it to become the representative organization of the American legal profession. The key element of the reorganization was the creation of the House of Delegates, whose members, now numbering 364, represent a variety of constituencies—geographical, state and local bar associations, specialized practice groups, the general membership, and other legal organizations and offices. In the reorganization special powers were placed in state delegates—one from each state plus the District of Columbia and Puerto Rico.

Proposals made at the 1977 annual meeting, which will be studied as hearings are conducted, show that there is a ferment within the Association to re-examine its organizational structure.

Three proposals were before the annual meeting to change the structure of House membership. One would have provided a proportional representation system under which the larger sections would have more than one delegate. Another would have given the Young Lawyers Division, which now has a membership of more than a hundred thousand, additional House members through representation of the division's geographical districts. The third would have added the chairman of the Board of Editors of the *Journal* to the House. All of these proposals were referred to the House Committee on House Membership for hearings, study, and report.

Two other proposals related to the method of selecting officers and members of the Board of Governors. At present officers and board members are nominated at the midyear meeting by the fifty-two state delegates—one nomination for each office—and elected by the House of Delegates at the annual meeting. While there is a provision for alternate nominations by petition, it has been used only once in forty years, and nomination by the state delegates has been tantamount to election.

One of the new proposals favored a petition system of nomination as the "primary" method of nominating officers, and the other, which originated in a resolution of the Section of Bar Activities, proposed a review of the "effectiveness of the current method of nominating and electing candidates." Both these proposals were referred to the House's Special Committee on Hearings, which will give Association members a chance to be heard and report its recommendations.

As the legal profession grows and the American Bar Association increases in membership, it is only natural evolution that there is an increasing interest in the governing processes of the Association. Lawyers form a large and important segment of modern American society —a nation within a nation, if you please. The fact that these proposals have been made, regardless of their individual merit, indicates that members have a commendable concern about maintaining the representative and democratic character of the Association's structure in the face of the burgeoning growth and heterogeneity of the legal profession.

Judicial Removal

FORTY-FOUR states, the District of Columbia, and Puerto Rico now have judicial tenure and removal commissions and provisions for the involuntary retirement or removal for misconduct of judges short of the impeachment process. For several years Congress has had similar legislation before it for the federal judiciary, and the Senate Subcommittee on Improvements in Judicial Machinery has held hearings on S. 1423, the Judicial Tenure Act. The Association's House of Delegates renewed its support for the legislation at the 1977 annual meeting, with the exclusion of members of the Supreme Court from the ambit of the legislation.

Two major arguments have been made against this legislation. The first has been that it is unconstitutional, that impeachment is the only constitutional method of removing federal judges from office. This argument has been answered by the reports of Association committees urging support of the legislation, by many constitutional scholars, and by the Department of Justice. Attorney General Bell reiterated the department's position last month, pointing out that Justice Rehnquist, when he was an assistant attorney general in 1970, reached the same conclusion.

Another contention has been that the creation of a removal system, no matter how benignly conceived, would have the effect of impairing the independence that is rightly expected of federal judges. This has not been the result, however, in the many states that have a similar system. Commissions and reviewing bodies have acted with restraint and sound judgment, and judges have not been subjected either to harassment or groundless charges. The proposed legislation would not permit proceedings on complaints that relate to a judge's decisions rather than conduct.

Recently in California, in a well-publicized case, an associate justice of the state's supreme court was involuntarily retired under the California removal system. One cannot read the reported decisions in that case without being impressed by the meticulously fair procedures followed. The commission presented findings supporting either a removal for misconduct or involuntary retirement for senility, and the special panel of the California Supreme Court chose the latter alternative.

The legislation before the Senate has a provision under which circuit judicial councils would have an opportunity to deal with complaints against district or circuit judges before the commission is called into action. This would give the judicial branch an opportunity to investigate and act on the complaint and, if the councils do their job, should keep most cases from going to the commission.

The Constitution provides that federal judges "shall hold their offices during good behavior." The public need not be confined to the process of impeachment to determine what is "good conduct."

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Personal Viewpoint *from one of our readers*

Doing Right by Marco DeFunis and Allan Bakke et al.

A T A RECENT law alumni meeting a dean made a moving plea for preserving the freedom that permits his school and others to favor the admission of disadvantaged minority applicants. Some weeks later an officer of another graduate school of that university testified in a criminal case that, when he was dean, places had been set aside for students who might be sponsored by persons who could benefit the university—state legislators, for example.

Both deans had the best of motives—one to help the disadvantaged, the other his university. They make the case, however, for not allowing discretionary admission policies that permit the exclusion of the best qualified students, whatever the alleged justification may be for the preferential treatment accorded those admitted. Tolerating or sanctioning preferential admissions is vulnerable, whether it functions as a quota system or on "broader, more subjective admissions standards," as suggested in the President's Page of the May, 1977, issue of this *Journal*. Laudable and desirable as these goals may be, the infirmities inherent in any discretionary preference process, no matter how nobly administered, admit of potential abuse—the favoring of the wealthy, politically powerful, or socially influential; the exclusion of Catholics or Jews, of blacks or Indians.

Nevertheless, the goals need not be abandoned. There may be a way to achieve them, provided we want to expend the effort and money to do so. Present admissions systems in professional schools, because they are predicated in the main on meritocracy and favor the well endowed, create the need for special admission formulas for the disadvantaged. But what is needed is the opposite of limited preferences—unlimited or open admissions, admission of all who may apply to law school.

At least three major objections will immediately be interposed. First, it will lower educational standards and the quality of the education offered. Second, law schools will be unable to accommodate the number of students admitted. Third, the profession will not be able to absorb the additional law school graduates.

An open admissions policy presents problems, but the objective makes their solution imperative.

Educational standards and quality. Open admissions are not new at the college level. California and New York have varying forms of open admissions. Of recent origin, the New York plan is the subject of many studies that indicate, perhaps tentatively, that it essentially does not result in lowering of academic standards or the quality of education.

What would happen in the law schools? We have some clues from minority programs that have been tried. The success of the Council for Legal Education Opportunity is well known. Evidence of like import may be gleaned from a report on a minority program at the University of Georgia Law School. And, of course, one of the principal justifications asserted for minority preferences in admissions is the achievements of students so admitted. These data indicate that open admissions might well succeed, rather than turn out to be an educational disaster.

Law school capacity. James P. White, consultant on legal education for the American Bar Association, reported in the March, 1976, issue of this *Journal* that for the year 1974 there were 83,100 persons who used the Law School Data Assembly Service — that is, completed law school applications and requested that L.S.A.T. results and undergraduate transcripts be sent to at least one school — there were 38,074 first-year admissions. Thus, discounting multiple applications, 45.8 per cent of the total number who applied were admitted. The corresponding numbers for 1975 were 82,243 requests to the L.S.D.A.S. and 39,038 admissions, or a percentage of 47.5. The percentage for 1973 was 43, for 1972, 42.8, and for 1971, 45. These numbers indicate that by slightly more than doubling their intake, law schools would be able to admit all who might apply.

Do law schools have the capacity to do this? In the late 1950s that innovative pragmatist, Beardsley Ruml, who had proposed income tax withholding, observed that university physical facilities were being substantially underutilized. He suggested that here were the means for increasing student bodies and reducing operating costs. This concept might be applied to law schools. Their classroom utilization, especially in schools without summer programs, might well be doubled, particularly if classes were scheduled in the evenings, on weekends, and, if necessary, at night. By staggering classroom hours to achieve a schedule that would not be one of merely two shifts, law schools should have the physical capacity to double the student population.

The critical component in expansion would be faculty. To increase teaching hours of existing faculty might not be tolerable, so more faculty members would be needed to meet the additional student load. This should be attainable, given the attraction that teaching, either on a full- or part-time basis, holds for able members of the profession. Additionally, the potential of computers in the teaching and learning processes might be explored more fully for application in legal education.

If suggestions for reducing the law school degree program from three to two years are adopted, substantial added capacity to educate more students will be available.

The number of lawyers. It is said that the legal profession is becoming overcrowded, that more persons are being admitted to the profession than can be employed. If true, to double the number to be admitted would aggravate an already difficult situation. While doubling law school admissions by open admissions would not necessarily double the number of graduates, there is little doubt that there would be more lawyers. Controlling the number admitted to law schools, however, in order to limit the number who will practice in the profession is a precarious policy and one that may become an object of governmental assault.

Other questions are relevant. Will

more lawyers than society can utilize reduce the number who seek admission so that a balance will be achieved between supply and demand? Does limiting the number of lawyers deny legal services to those in need of them? Will a surplus of lawyers cause a movement of legal services to areas where needed? Do present law school preferential admission policies result in the graduation of minority lawyers who seek prestigious placements rather than service to minority populations? Overcrowding is not a ready rebuttal to open admissions.

A host of other problems may confront open admissions—the capacity of law libraries to serve increased student bodies; the availability of facilities and personnel for clinical training; larger classes; prelaw admission criteria and allocation of applicants among law schools; special preparatory and tutorial programs; grading methods; the economics of expansion; longer workdays and workweeks; review of law school standards—to name but some.

But open admissions would afford all members of disadvantaged minorities the opportunity to earn their law degrees by completing their educational requirements without displacing other law school applicants. This is a forthright approach to the difficulties posed by *DeFunis* and *Bakke* and the profession's desire to do right. It merits careful inquiry and the application of our ingenuity and resources.

—PAUL A. WOLKIN

(Mr. Wolkin is assistant director of the American Law Institute and executive director of the A.L.I.–American Bar Association Committee on Continuing Professional Education.)

Mid-America Tax Conference to Be Held in Saint Louis

THE SIXTEENTH annual Mid-American Tax Conference, sponsored by the Saint Louis Chapter of the Missouri Society of Certified Public Accountants and the Bar Association of Metropolitan Saint Louis, will be held November 3–4 at the Breckenridge Pavilion Inn in Saint Louis.

Al Ullman, chairman of the House Committee on Ways and Means, will be one of the featured speakers.

Further information may be obtained from Warren R. Maichel, Peper, Martin, Jensen, Maichel, and Hetlage, 720 Olive Street, Saint Louis, Missouri 63101. ▲

Views of Our Readers

Judicial Selection

BATON ROUGE, LOUISIANA

The recent institution by President Carter and Attorney General Bell of "independent commission(s) as an agency of the president to advise with the president on appointments, and to receive from outside sources and from all segments of the organized bar, suggestions of names of persons deemed highly qualified for appointment as judges" of the federal courts of appeals has occasioned no mention of the highly significant resolution of the American Bar Association House of Delegates of August 26, 1958, urging that independent and nonpartisan commissions be created with respect to submitting names for consideration for appointment to all federal courts, especially the district courts.

Officially the Association remained silent with respect to the 1958 resolution until it was reaffirmed and readopted by the House on August 9, 1977, on my motion to amend a pending resolution relating to the appointment of federal judges. (The text of the 1977 resolution appears at page 1239 of the September *Journal*.)

The Association may well be proud to have been the first organization to have urged what President Carter and Attorney General Bell now have accepted at least in part.

There are but few members now active in the affairs of the Association who remember the original 1958 resolution and the intensive debate it produced. I remember it vividly because I sponsored it—based in part on my experience from nine years of service on the Federal Judiciary Committee. And I was chairman of the special committee appointed to implement the 1958 resolution at the time that committee was abruptly terminated in 1962, the real reason for which I have never been able to fathom.

The resolution's cosponsors and advocates included four past presidents and other outstanding Association members. Of course, there were opponents. In the debate Orison Marden, who later became a president of the Association, characterized the opposition: "I agree wholeheartedly in principle with the objectives of this resolution, and I think that the objections to it are objections, much as I respect the men who made them, of timidity and expediency."

It was a fit and proper tribute to many fine leaders of the bar that the 1958 resolution was reaffirmed on August 9 and restored once again as "official Association policy." Vigorous efforts should once again be renewed to implement it.

BEN R. MILLER

Statements intended for publication not exceeding 300 words are most suitable for inclusion in this department. The Board of Editors reserves to itself the right to select the communications or excerpts therefrom that it will publish and to reject others. The Board is not responsible for matters stated or views expressed in any communication.

Lambs to the Slaughter

SAN FRANCISCO, CALIFORNIA

I am writing in regard to the "Out in front" article, "E.R.A.: More clout for women's rights," by Deborah Williams, in the June *Journal*, page 776.

The equal rights amendment should be condemned by this Association as an outrageous absurdity. What man would consign his wife or daughter to the slaughter, torture, and prisoner-of-war status of military combat? Would he do so in the hopes that the added complement of female conscriptees would spare him his own hazardous duty? Will he, in the heat of battle, command her to go forward to death with honor, or will chivalry in the field cause confusion in the integrated ranks? In peacetime will he tolerate quotas that make her fight street crime, put out tenement fires, risk mine cave-ins, and embrace all other hazards from which she has fought these many years to be free? Will he rescind his duty to support her who has pledged her life to him in solemn partnership? Will he trifle with her modesty and privacy on the dubious ground of separate but equal? Will he invite federal planners to invent more games like Title IX? Will he ignore the many legal safeguards to equal opportunity already in force so as to demean her status and load on her heavy burdens she neither wants nor needs to be free and equal?

The equal rights amendment embodies the inexcusable error noted by de Tocqueville more than one hundred thirty years ago: It makes men and women into beings not only equal but alike. Gentlemen, I am disappointed.

THOMAS M. BURTON

Wallowing in Filth

CLEAR LAKE, SOUTH DAKOTA

I have always enjoyed the *Journal*, even when I have disagreed. However, the cartoon on page 1127 of the August issue is neither enjoyable nor appropriate. . . .

. . . If Herblock wants to wallow in his filth with his contemporaries as a hog would in a confined area, we out here where there is plenty of room may decide that we would rather live clean and unconfined adhering to contemporary community standards. . . .

GORDON GUNDERSON

Prostitution of the Profession

WASHINGTON, PENNSYLVANIA

It is interesting to note that the *San Diego Union* runs lawyers' advertisements on page one of its classified ads immediately next to advertisements for "out call massage" at forty dollars an hour.

Draw from this any appropriate conclusions regarding advertising by professionals, be they lawyers or otherwise.

DAVID S. POSNER

Only the Beginning

SOMERVILLE, MASSACHUSETTS

I was very pleased to see the article on the independent presidential efforts of Eugene McCarthy ("The Bloodless Revolution of 1976," by John C. Armor and Philip Marcus, August *Journal*, page 1108). For all citizens the issue of fair ballot access is more than a legal issue—it is a "democracy" issue.

(Continued on page 1354)

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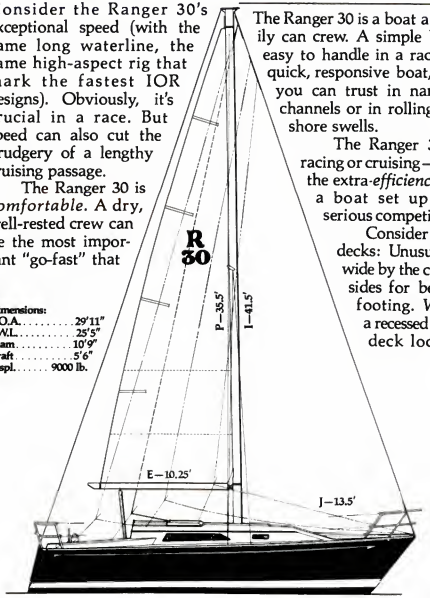

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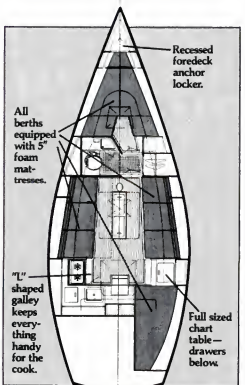

CRUISING COMFORT

As for her cockpit, it's roomier than many boats her size—for comfort on a cruise and unrestricted crew work on the race course. "T" shaped so the skipper has a better view of the sails—and room to stay clear of

crew members cranking winches.

Below, the goal is pampering the crew. The "L" shaped galley keeps everything handy for the cook: stainless steel sink, icebox, two-burner stove (and optional oven).

The navigator's table is high enough to work at, big enough to plot a course on. And all six bunks use five-inch foam to keep you rested on your watch below.

The Ranger 30 handles easily in a narrow harbor.

The Ranger 30's beamy hull means a roomy cockpit and lots of space below.

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(Continued from page 1350)

As a McCarthy '76 volunteer, I would like to call special emphasis to two points made in the article: (1) the efforts to obtain ballot access would not have succeeded without the volunteer work of lawyers and (2) the practical problem remains, that is, how to demonstrate a minimum amount of community support to legitimize placing a candidate on the ballot.

It seems clear that lawyers have a special responsibility, and in many cases only lawyers possess the necessary expertise to ensure the proper working of a democracy—1976 was an excellent start.

It also seems clear that the media coverage of the 1976 presidential campaign was frightfully inadequate in respect to straight news reporting and dangerously biased in respect to editorial and opinion analysis (which refused to view third parties seriously). . . .

Unfortunately, there were no great legal victories over media coverage — we lost badly on the televised debates. The media struggle will likely continue to be one of attempting to change attitudes, of attempting to persuade the media not to rush to prejudge a candidate's significance.

We have won significant legal victories for ballot access, but these are narrow accomplishments. We now have a larger framework in which to work, and much remains to be done.

PATRICIA A. PETOW

Not a Panacea

WARREN, OHIO

Undoubtedly the *Journal* should be a forum for the introduction of new ideas on the reform and improvement of law, trial procedures, and the like, and I am sure that Judge McCrystal's article on prerecorded videotape trials in the July issue, page 977, falls in that classification.

May I, as one who has participated unwillingly in the videotape trial experiment, give my opinion that prerecorded videotape trials are not the panacea for court congestion suggested by Judge McCrystal. For instance, if you talk to the proponents of the system, as I have talked to Judge McCrystal, and inquire about the cost of these trials, you get no satisfactory answer. You will note in Judge McCrystal's article that he does not mention cost.

The one trial I participated in cost my client $2,693.38 in court costs (attorneys' fees are not included) of which $1,691 was directly related to the expense of prerecording testimony on videotape. . . .

There is in my opinion serious doubt as to many of the other claims made by Judge McCrystal as far as saving court time, jury reaction, and the like. Discussion of problems that arise when any kind of a complicated legal issue is raised during the course of taking videotape testimony requires explanation as lengthy as the article written by Judge McCrystal.

It is not my intent here to do more than to point out that any court system thinking to follow the Erie County, Ohio, experiment in videotape should look long and hard before becoming involved in it and certainly should consult others than Judge McCrystal.

WILLIAM R. HEWITT

Problems with Parole

INDIANAPOLIS, INDIANA

As a lawyer and as chairman of the Indiana Board of Correction, I was more than a little interested in the article, "Second Thoughts on Parole," by George F. Cole and Susette M. Talarico, in the July *Journal*, page 972. . . . I think it is a grave error for researchers to apply the results of statistics in one parole system (Connecticut) to the entire parole system in at least fifty states plus the federal government. The article did nothing to prove or disprove the hypothesis that "The system of parole solves more problems than it creates." In fact, the thought crossed my mind that this quote was a misprint.

I look forward to more exhaustive discussions of parole in the *Journal*. The entire subject of the postincarceration handling and treatment of offenders is important and deserves the attention of every lawyer in the country. Here in Indiana we face myriad misconceptions of parole and are striving to remedy that situation. These misconceptions stand in the way of work and study release and expanded community correction projects. It is our hope that the *Journal* can go a long way in dispelling some of these misconceptions.

DANIEL F. EVANS, JR.

CHICAGO, ILLINOIS

I read with interest "Second Thoughts on Parole." While I think the piece is a worthwhile analysis of the current controversy regarding the continuation of indeterminate sentencing and our present system of parole, there is one state-

(Continued on page 1360)

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New York—the city for all seasons—and for all reasons. The place where there is more to see and more to do than in any other metropolis in the world!

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American Bar Association
1978 Centennial Annual Meeting
New York, New York
August 3-9, 1978

REGISTRATION NUMBER

1. REGISTRANT

Name _____
Last First Middle

Address _____

City _____ State _____ Zip _____

Business Phone No. _____
Area Code

Home Address (if not listed above) _____

City _____ State _____ Zip _____

FOR OFFICE USE ONLY

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2. REGISTRATION FEE
Request for Registration must be accompanied by appropriate fee.

Check One		Registration Fee
M ☐	Association Member	$100.00
Y ☐	Young Lawyer (Association Member under 36 years of age)	$ 75.00
T ☐	Associate	$100.00
U ☐	Young Associate (Under 36 years of age)	$ 75.00
S ☐	Law Student	$ 25.00
N ☐	Non ABA Member	$100.00
X ☐	Judge (Judicial Administration Division Members)	$ 50.00
Z ☐	Judge (Judicial Associate)	$ 50.00

3. ARE YOU A LAWYER?
☐ Yes ☐ No

4. TITLE: For the purpose of issuing your identification badge at this meeting, please check appropriate box.

☐ A Chief Justice ☐ C Chief Judge ☐ E Dean ☐ G Military Title _____

☐ B Justice ☐ D Judge ☐ F Professor ☐ H No Title on Badge

ACCOMMODATIONS

5. HOTEL DESIRED (Please give three choices. See reverse side).

1. Hotel _____ Code
2. Hotel _____ Code
3. Hotel _____ Code

6. ACCOMMODATIONS DESIRED (Indicate number of rooms desired in appropriate box).

☐ S Single ☐ D Double ☐ T Twin ☐ B Triple

☐ One Bedroom Parlor Suite ☐ Two Bedroom Parlor Suite

☐ Other _____

7. I WILL NOT NEED HOTEL ACCOMMODATIONS

☐ My Address will be: _____
(To appear on Advance Registration List)

8. ARRIVAL AND DEPARTURE

Arrival Date _____ Time: _____ ☐ AM ☐ PM

Departure Date: _____ Time: _____ ☐ AM ☐ PM

9. PERSONS ACCOMPANYING REGISTRANT

☐ Husband ☐ Wife

Number of Children Attending: ☐ A Ages 1-6 ☐ B Ages 7-12 ☐ C Ages 13-18 ☐ D Other

Accompanying Spouse: _____
(Name, as you wish it to appear on badge)

Names of other persons accompanying registrant: _____

MEETINGS

10.

I am primarily interested in meetings of: _____
(Section, Division or Affiliated Organization)

Form Submitted by _____ Date _____

Send this form with registration fee (Check payable to American Bar Association) to:

Annual Meeting Registration
American Bar Association
1155 East 60th Street, Chicago, Illinois 60637

In order to register in advance for the meeting, your registration form must be received by the American Bar Association no later than the **Deadline Date of July 13, 1978.**

SECTIONS AND DIVISIONS*	Meeting Dates	Meeting Hotel
Administrative Law	August 5-9	Waldorf-Astoria
Antitrust Law	August 6-9	Plaza Hotel
Bar Activities	August 5-6	New York Hilton
Corporation, Banking & Business Law	August 4-9	Americana of New York
Criminal Justice	August 5-9	St. Regis-Sheraton
Economics of Law Practice	August 4-8	New York Hilton
Family Law	August 4-10	Marriott's Essex House
General Practice	August 4-9	Waldorf-Astoria
Individual Rights & Responsibilities	August 4-9	New York Hilton
Insurance, Negligence & Compensation Law	August 3-10	Waldorf-Astoria
International Law	August 4-9	Waldorf-Astoria
Judicial Administration Division	August 4-9	Americana of New York
Labor Relations Law	August 5-9	New York Hilton
Law Student Division	August 5-9	Americana of New York
Legal Education & Admissions to the Bar	August 4-9	Americana of New York
Litigation	August 5-9	Biltmore Hotel
Local Government Law	August 3-5	New York Hilton
Natural Resources Law	August 6-9	St. Regis-Sheraton
Patent, Trademark & Copyright Law	August 4-9	Waldorf-Astoria
Public Contract Law	August 5-8	Plaza Hotel
Public Utility Law	August 6-9	Pierre Hotel Gotham Hotel Park Lane Hotel Regency Hotel
Real Property, Probate & Trust Law	August 4-8	New York Hilton
Science & Technology	August 4-7	New York Hilton
Taxation	August 2-8	Plaza Hotel
Young Lawyers Division	August 1-7	Plaza Hotel

KEY TO MAP

1—Americana City Studio Inn
2—Americana of New York
3—Barbizon Plaza Hotel
4—Barclay Hotel
5—Biltmore Hotel
6—Gotham Hotel
7—Howard Johnson's Motor Lodge
6—Marriott's Essex House Hotel
9—New York Hilton Hotel
10—New York Sheraton
11—Park Lane Hotel
12—Pierre Hotel
13—Plaza Hotel
14—Ramada Inn
15—Regency Hotel
16—St. Moritz-on-the-Park
17—St. Regis-Sheraton
18—Statler Hilton Hotel
19—Waldorf-Astoria Hotel
20—Warwick Hotel

(Continued from page 1354)

ment in the article that I find almost incomprehensible. In the last paragraph, the authors argue that requiring a judge to set a flat sentence and give reasons for it and provisions for appellate review will "increase the power of the prosecutor and police to make the real decisions in the system." That conclusion in my opinion simply does not flow from the premises offered by the authors. Requiring reasons to be given for sentences which may be the subject of review is likely to make a sentencing judge more responsible to his local constituency. The ability of police and our prosecutors to adjust charges in order to both: (1) maintain leverage against defendants who might otherwise be more likely to seek trial and (2) maintain a reasonably brisk pace in the processing of cases would be curtailed by placing specific responsibility on the trial judge to account for sentencing decisions. In sum, the alternative system suggested seems likely to ensure greater independence of judges from the influence of police and prosecutors.

The article persuasively demonstrates that the predominant system of indeterminate sentencing and parole effectively passes the sentencing decision along to the parole board. Given that sentencing of persons found guilty of a crime is something that the system should be accountable to the public for, it makes a great deal more sense to place the real power and responsibility for it in the more clearly focal office of the trial judge rather than leaving it in the relatively remote and obscure parole board.

STEPHEN A. SCHILLER

The Evils of Moderation

OAK FOREST, ILLINOIS

During my twenty-five years of experience as a public school administrator, I have found lawyers eager and willing to help with the management of the schools. My lawyer friends have been particularly forthright in helping me to clear my head of educational jargon, to get down to clear thinking, and to recognize only absolute court admissible facts.

Acknowledgments to the bar for contributions to the school would be incomplete without mention of the new freedoms of dress and grooming that lawyers and judges have wrested from tyrannical communities. A sea of navels and nipples gives lively testimony to this new freedom in most school classrooms. Following the lawyers' lead, the students have vigorously asserted their rights to criticize the government and the schools. What school official can escape the bold challenge of a student's T-shirt slogan? . . .

I have a suspicion that a few vital questions of our times must be answered by some agency other than the courts. I would almost dare to assert that the legal profession should not have the last word in every school question. . . .

So I wind up in a begging posture rather than a questioning one. I beg the Association to help establish another branch of the court system. Set up a court in every school building and staff it with attorneys in the model of the regular courts; that is, a prosecutor, a defender, and a judge. Let students bring their cases directly to these courts.

Under this arrangement administrators can go back to teaching, school boards can be abolished, and old-fashioned teachers who wish to teach reading may request continuances. In the legal spirit of the times, all continuances will be granted, and between court dates the old-fashioned cranks will find the time to do their reading thing. The rest of us will give full time to legal matters. Everybody will be happier.

TOBY HIGHTOWER

No Excuse for Res Gestae

AUSTIN, TEXAS

Judge Moylan's "Res Gestae, Or Why Is That Event Speaking and What Is It Doing in This Courtroom?," July *Journal*, page 968, is not only humorous, it's excellent.

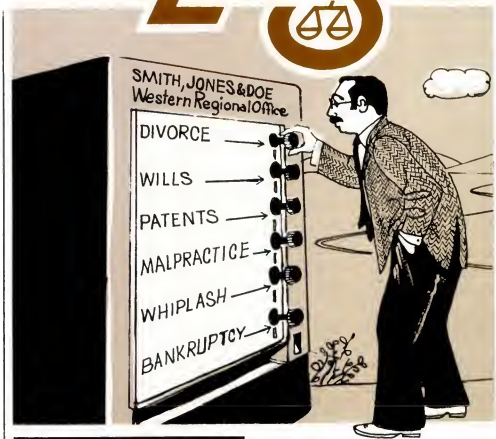
If every trial judge and every trial lawyer were required to read Judge Moylan's gem, perhaps we no longer would hear "res gestae" being invoked in the courtroom—for surely everyone would be embarrassed to rely on this fatuous catch-all.

JOHN F. SUTTON, JR.

Correction

AN IMPORTANT word—"nonpartisan"—was omitted from the text of the House of Delegates' resolution on nonpartisan merit selection of federal judges that appeared on page 1238 of the September issue of the *Journal*. As corrected, the first part of the second resolved paragraph should read: "That the American Bar Association recommends that the president of the United States establish a nonpartisan United States Circuit Judge Nominating Commission. . . ."

LAWSCOPE



LAW PRACTICE

National law firm era dawns

Pulling into the shopping center one Thursday evening, the young couple park their car, then lead a toddler toward a storefront labeled "Legal Clinic of Palmer and Kilian." They want to have wills made.

Inside, a receptionist ushers them into a private room, where a paralegal interviews them. The paralegal takes notes on their property and their intentions for it, asks them to bring some insurance papers for a lawyer to examine, and tells them to come back Monday evening.

Returning on Monday, they talk with a lawyer, who has in hand preprinted will forms with the blanks filled out according to the information taken by the paralegal on the first visit. The lawyer examines the couple's insurance benefits, changes an item on one will, and explains to them how their wills meet their needs. Two employees serve as witnesses as the husband and wife sign the documents.

With two nationwide legal services now established, can the age of H&R Block law firms be far behind?

The meeting with the lawyer has taken just a few minutes, and they are done. As they leave, the husband presents a bank charge card to the receptionist in payment of the fee. The wife and child head next door to the supermarket, he in the other direction to the shoe store.

This scenario is not far-fetched. Legal clinics are cropping up in shopping centers and on commercial streets. And when they have multiple locations and operate much like chain stores, they are but one form of what may be incipient national law firms, offering H&R Block-style legal services at convenient neighborhood locations and at low cost.

And clinics aren't the only form such national firms might take. Murphy and West, a Los Angeles-based firm that specializes in providing consultation and referrals to members of nonprofit organizations, has put together a highly successful nationwide operation.

Murphy and West has enlisted a panel of more than 2,800 associate lawyers in all fifty states and the District of Columbia. Associates agree to give telephone or in-person advice to members of Murphy and West client groups without an initial consultation fee.

Should further legal help be needed, a group member is quoted a fee in advance. He or she may decline to employ the Murphy and West panel members—or the lawyer may refuse the case.

Associates pay no entry fees to Murphy and West, nor do they owe any referral charges out of the fee-producing cases they may obtain. Rather, Murphy and West spokesman Hugh Slate indicates, the arrangement brings potential profit to participating firms by attracting to their doors members of a number of groups who could not be served by a single local or even statewide law firm.

If the name "Murphy and West" is not familiar, that may be because Murphy and West itself operates only in California. In other states, associated lawyers are identified only by the names of their own law firms. Members of client groups are told what firm to contact in a given area to obtain legal counsel under the program.

The system might operate as Murphy and West nationwide except for the dim view that bar officials in some states took of this multistate linkage. D.R. 2-102 (B) of the A.B.A. Code of Professional Responsibility bars lawyers from practicing under a "trade name" or a name that is "misleading as to the identity of the lawyer or lawyers practicing under such name."

The use of a single name nationwide would be important to Murphy and West if they were planning a vast advertising campaign, but the firm isn't sold on lawyer advertising.

Continued on page 1375.

Out in front

Why can't they 'do something' about sensational reporting?

Less than two months after the Supreme Court's decision on lawyer advertising, a suspect was arrested in New York City's "Son of Sam" murder case.

The news media characteristically reported extensively on the story—and then some. Cries went up that the media were behaving irresponsibly, and some lawyers said a fair trial for the defendant was impossible because of prejudicial pretrial publicity.

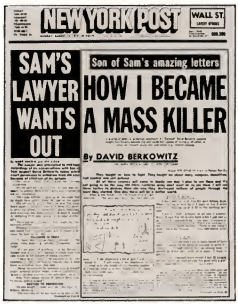
At first glance the landmark advertising decision and the press orgy over the arrest of a murder suspect seem unrelated. But taken together, the two events serve to bring the underlying antipress attitude of many judges and lawyers into sharper focus.

That attitude has nothing to do with protecting the rights of the accused, but all to do with what many in the legal profession see as the media's "getting away with" in a professional sense.

Professionals, no matter in what field, resent being told how to do their jobs. They regard outsiders as being incapable of understanding the ins and outs of the profession.

This is especially true of lawyers, who, in general, believe they know what's best for lawyers, the legal system, and, to a lesser extent, society as a whole. They exude an air of respectability and correctness.

But now, with the increasing threat of government regulation and public participation in decision making for the profession, lawyers, under the banner of self-regulation, are closing ranks as never before in a race to prove to the regulators that self-regulation works.


NEW YORK POST

WALL ST. LATEST STOCK

SAM'S LAWYER WANTS OUT

Son of Sam's amazing letters

HOW I BECAME A MASS KILLER

By DAVID BERKOWITZ

The media, however, are virtually free from the threat of government regulation of their conduct. In fact, in the last two major challenges (the Pentagon Papers case and *Nebraska Press Association v. Stuart*), the press's freedom from regulation was strongly reaffirmed by the Supreme Court.

Most lawyers have never really understood why "something can't be done" about the media. When lawyers perceive a "wrong" (apparently prejudicial pretrial publicity, for example), they look to the courts for a remedy.

But media behavior just doesn't fit into the adversary system that colors in large part the legal profession's way of thinking.

By virtue of constitutional protection, the news media occupy a domain outside of traditional legal theory. As some commentators have said, the press is free to be irresponsible. The idea that there is no press accountability is repugnant to most lawyers for it is a problem with no corresponding legal solution.

If the media are guilty of mistakes in judgment, in the "Son of Sam" case, for instance, there is no way to punish them. There is no media discipline board.

But, if a lawyer or judge exercises poor ethical judgment, he or she increasingly is being made to pay for it.

Regulation of the press, such as does exist, is determined by editors, publishers, and station managers according to their own tastes and standards, which is the way it used to be for the lawyers. But now the legal profession faces the loss of its self-regulatory powers, while the press's remains intact.

There is no doubt that press coverage of cases such as the "Son of Sam" makes the job of lawyers and judges involved more difficult. It does not make the job impossible, however.

In *Stuart*, one of the most recent fair-trial/free-press decisions, the Supreme Court, while outlining acceptable steps to lessen the effects of pretrial news coverage, seemed to be telling judges and lawyers involved in sensational cases simply to work harder at ensuring a fair trial—but not at the expense of the press through "gagging."

The legal profession and the media both occupy positions of public trust, but there is an important difference between the two. Those in the legal profession are forced to act ethically and responsibly, with the threat of reprimand if they do not. There is no similar threat against the media, and there can't be if they are to function in the critically important role of keeping an eye on the process of government and the judicial system.

Writer Alan Barth effectively summed up the need for a free press recently in a column in *The Washington Post*.

"If you want a watchdog to warn you of intruders," he said, "you must put up with a certain amount of mistaken barking. And that kind of barking can, of course, be a nuisance. But if you muzzle him and leash him and teach him decorum, you will find that he doesn't do the job for which you got him in the first place. Some extraneous barking is the price you must pay for his service as a watchdog."

—Craig Gaare

INDIVIDUAL RIGHTS

Privacy in the U.S. is an illusion: report

Creation of a new legally enforceable interest—an "expectation of confidentiality"—has been urged by a federal commission seeking to return individual privacy to American citizens.

The Privacy Protection Study Commission has reported to President Jimmy Carter and Congress that personal privacy is an illusion in the United States.

Steps must be taken soon to reduce the intrusiveness of record keepers and to ensure the fairness and accuracy of the records they keep, the commission contends. And it details more than 160 specific steps to balance social and individual interests in information gathering.

The report urges strong controls over government collection and use of individually identifiable records. One recommendation would allow private attorneys general to force government compliance with access, correction, and amendment procedures without demonstrating injury. Another would allow

Federal study advocates legally enforceable 'expectation of confidentiality.'

suits for between $1,000 and $10,000 in general damages exceeding any special damages.

In the private sector, the commission urges legislation establishing rights of individuals to know what information is collected about them and the sources from which it was obtained, requiring a person's consent for information about him to be transferred from one place to another, and permitting individuals to copy, correct, or amend records.

For such areas as insurance, medicine, credit, and education, the commission recommends that people be given the right to sue for willful and intentional violation of these privacy statutes. Attorneys' fees would be recoverable, but damages would be limited to $1,000 without demonstrable injury and $10,000 with injury.

In on oge of computers, does privacy have any meoning?

The report says some mandatory compliance could come through regulation by existing programs or agencies, such as Medicaid and Medicare, and the Federal Reserve Bank. And the study recommends that states be compelled to enact similar legislation or face loss of federal aid.

In addition, the commission urges creation of a new federal agency to monitor legislative and administrative activity, interpret legislation, and research privacy issues.

Criticism of some of the commission's work has surfaced already. John Shattuck, director of the Washington office of the American Civil Liberties Union, applauded such suggestions as requiring that the government have subpoenas and search warrants to obtain bank or medical records, but called the provisions dealing with the private sector "disappointing" for lack of teeth. He maintains that requiring an individual suit to show willful and intentional harm is too high a standard to be effective, while a negligence standard would be more likely to force business recognition of privacy rights.

"There is a lot of red herring going on here," says Shattuck, referring to what he terms general hortatory language extending rights without remedies.

On the same day the report was released, ten bills were introduced in the House to implement some of the proposals. Sponsors are Reps. Barry M. Goldwater, Jr. (R-Calif.) and Edward I. Koch (D-N.Y.). Because of the voter appeal of the privacy issue, Congress is expected to be receptive to many of the suggestions.

Enactment of many of the measures could have a big impact on legal practice. The provisions for privacy-invasion lawsuits would provide new legal strategies, but other legal tactics could be curtailed. One such area, the commission noted, was obtaining medical records on individuals without their consent "for use by lawyers and insurance claim adjusters." Use of false pretenses or pretext interviews should be crimes, the commission urged.

May governments deny jobs to ex-convicts?

Do state and local governments have an inherent legislative discretion to flatly deny access to some jobs to persons convicted of certain crimes?

The Supreme Court will consider that question this term, in a case that has received little general attention but could determine the validity of laws on the books of most states.

The City of Chicago is appealing a ruling by the Seventh Circuit Court of Appeals that held as unconstitutional a municipal ordinance barring issuance of chauffeurs' licenses to persons convicted of crimes involving the use of deadly weapons. The licenses are required for drivers of taxicabs, ambulances, buses and rapid transit.

Although the city code prohibits licensing persons convicted of crimes using deadly weapons, traffic in narcotics or certain sex crimes, it *does* permit licensing of persons convicted of other crimes—some of them more serious, such as murder, and some involving use of cars, such as kidnaping—after a review of the fitness of those applicants. The code, further, does not require revocation when already licensed persons are convicted of any crime.

The city maintains that the ordinance is rationally related to its responsibility to ensure passenger safety and that it has the inherent legislative right to determine what measures will satisfy this responsibility.

Luther Miller, the original plaintiff, contends that the city violated his constitutional rights when it refused to permit him to apply for a chauffeur's license in 1974 because he was convicted of armed robbery in 1965. Miller is represented by the Legal Assistance Foundation of Chicago and the Roger Baldwin Foundation of the American Civil Liberties Union, Inc., Illinois. Howard Eglit, one of his Chicago attorneys, suggests that, if the Supreme Court upholds Miller's claim and uses very broad language in its ruling, the decision could then be used to question the constitutionality of other impediments to convict civil rights and could prompt more lawsuits. But anything less in the way of a ruling would probably have little impact on the political trend to give more legislative recognition to claims of convicts who have fulfilled their sentences, he said.

Chicago asks Supreme Court OK of ban on cabbies convicted of armed robbery.

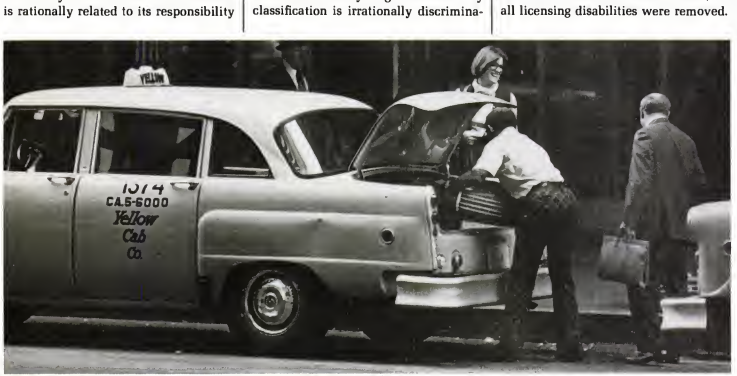
Miller's attorneys argue that the city classification is irrationally discriminatory. They maintain that the city must base licensing decisions on findings of present fitness, not past conduct—just as it does for all other applicants and licensees.

Although the court of appeals ruled for Miller on equal-protection grounds, due-process arguments also are at issue in the appeal.

The American Bar Association has filed an *amicus curiae* brief in the Chicago case, *Carter* v. *Miller*, as has the San Francisco Lawyers' Committee for Urban Affairs. Both support Miller's contentions.

The A.B.A. brief reiterates association policy, adopted by the House of Delegates in 1975, calling for elimination of laws denying licenses solely because of past convictions. That policy also is expressed in the tentative draft of Standards Relating to the Legal Status of Prisoners, to be presented to the delegates at next year's annual meeting.

Prohibitive licensing laws applying to convicted persons, which are hardly unique to the City of Chicago, are gradually disappearing. In June 1974, thirteen states had adopted laws limiting consideration of past convictions in occupational licensing, according to the American Bar Association National Clearinghouse on Offender Employment Restrictions. By March of this year, half the states had done so, said the clearinghouse, which now is disbanded. But even where laws had been revised, not all licensing disabilities were removed.



Should armed-robbery convicts be prevented from driving cabs?

THE FAMILY

Alimony is good for marriage: professor

Contrary to widely accepted theory, alimony and fault finding in divorce are positive influences on marriage, a University of Chicago economist has concluded in a study.

Alimony provides an efficient insurance policy covering marriages-on-the-rocks, and divorce findings of fault encourage spouses to devote more of their resources toward building a satisfying partnership, according to Elisabeth Landes, a visiting assistant professor in the university's Graduate School of Business.

To test her theories, Landes compared 1970 census figures in states that prohibit alimony with those that grant it, and data for states employing fault divorce systems with those using no-fault criteria.

She found that fewer women marry and fewer of the married women have children in states where alimony is not allowed. In no-fault-divorce states employing property settlements, Landes found that husbands and wives are less inclined to focus their energies on building marital resources—and that wives show a greater tendency to maintain marketable skills.

Three states—Delaware, Pennsylvania, and Texas—have prohibited alimony in divorces, although Delaware and Pennsylvania now award it in limited situations. They have a "sizably higher percentage of women aged 25 to 34 who are not married," when all other factors are equalized, Landes says. And

Study shows fewer women marry in non-alimony states.

she says those that are married have fewer children.

Landes acknowledges that her conclusions are "directly opposed to the common allegation that alimony is an 'anachronistic' manifestation of the wife's dependency upon her husband." But, she says, more and more women are in the labor force and marital fertility is declining. Since alimony compensates wives for opportunities lost through their investment in marriage, she reasons, its importance will decline.

In any event, divorce laws are changing. Alimony long has been a source of divorce insurance only for women. But now thirty-five jurisdictions will award it to either spouse.

And Dr. Doris Jonas Freed, chairman of the Divorce Law and Procedures Committee of the American Bar Association Section of Family Law, notes a trend toward temporary maintenance and away from alimony. This is practiced in thirty-four common-law-property and eight community-property states, she says.

Alimony is ineffective because "it's hard to collect and very demoralizing," says Judy P. Younger, deputy dean at Cornell Law School. She urges a marriage-license prerequisite of vocational training as an alternative.

But Landes denies "preventive" measures would be effective. She argues that divorce preparation would be harmful to the marriage climate and insists that alimony is the best safeguard for marital bliss.

CORRECTIONS

A.C.L.U. official clashes with prison lawyers

Publicly employed attorneys have a higher obligation than advocacy in behalf of their official clients, says David Goldberger, legal director for the Illinois Division of the American Civil Liberties Union.

He said it is the attorneys' ethical duty not to advise how to legally evade requirements of the law and Constitution, although this standard may not apply to lawyers for private citizens.

Goldberger's argument met skepticism when he advanced it at a September seminar in Chicago on the defense of jail-inmate civil-rights suits, sponsored by the Americans for Effective Law Enforcement.

He took issue with a defense strategy outlined by Frederick R. Bennett, deputy counsel for Los Angeles County, terming it an attempt to "superficially gloss situations without dealing with underlying policies."

Bennett had advised jailors and their attorneys to develop "well-written policies" that he said would "minimize the impact of isolated testimony about actual practices" that conflict with legal requirements. Bennett also advised them to keep detailed records to defend themselves against constitutional claims but to be selective in the type of records they maintain.

In response, Goldberger told the attorneys that "the notion which I think is growing is that maybe we cannot make the changes [in policy to correct alleged constitutional violations], but we can obscure the problems."

The A.C.L.U. official said, "That's sound advocacy, but your job is not simply to be advocates. Your job is to do justice." He suggested these tactics result from "a glorious conflict of interest" from representing an official client as well as the public interest.

Wayne Schmidt, operating director for the A.E.L.E. and an attorney, argued that Goldberger was advocating a double standard. Schmidt suggested that criminal defense lawyers in particular do not adhere to these high principles.

"Is it because you are employed by a public agency that you're supposed to do justice?" asked Schmidt. Another attorney argued that his obligation is to protect the public-official defendants he represents and nothing more.

"Yes, there is a double standard, and it's a higher standard," responded Goldberger. "You have a much higher obligation as members of the bar and public officials than your adversaries do."

He said, "I don't think it's hard to protect your client against personal liability unless he has done something he knew, or should have known, he shouldn't do."

But, he argued, "I don't think lawyers ought to be counseling their clients as to how to avoid their obligations" under the Constitution.

Is it right for attorneys to help corrections officials avoid regulations?

Judging from general audience reaction, Goldberger convinced only himself. One conference participant even questioned Goldberger's motives—suggesting he and other inmate advocates are trying to destroy the corrections system by making it too expensive to operate.

People

■ A $10 limit on attorney fees in appeals of Veterans Administration decisions on benefit claims effectively denies former servicemen benefits they have earned, attorney **Harvey Levin** told the Senate Veterans Affairs Committee. Testifying for the American Bar Association Special Committee on Federal Limitations on Attorneys' Fees, Levin said the "harsh" fee ceiling makes it "all but impossible" for lawyers to assist veterans.

■ That old baby-slicing jurisprudence got Solomon off the hook, but it isn't likely to help **Robert Van Pelt**, senior judge of U.S. District Court in Lincoln, Nebraska, named by the Supreme Court as special master in a California-Nevada boundary dispute dating back to the last century. Since a ruling will settle the statehood of gambling casinos in the disputed zone, Van Pelt may be grateful that the last "shooting war" over the land ended in 1865.

■ If Wisconsin has to sanitize its sewage, Illinois had better deodorize its air, argues Rep. **Les Aspin** (D-Wisc.). The representative is threatening

Aspin

a grudge match in the courts against Illinois, following a district court ruling won by the Land of Lincoln that ordered Milwaukee to stop polluting Lake Michigan.

■ Dare to be a Daniel and take on the Burger Court, urges Colorado Supreme Court Justice **Jim Carrigan.** At the annual meeting of the Association of Trial Lawyers of America, Carrigan said Chief Justice Warren E. Burger has a "let them eat cake" attitude toward the injured and disadvantaged and trial lawyers must fight for their independence and for justice.

■ News reporters don't routinely abet jailbreaks, but the U.S. Bureau of Prisons acts as though they do, charges **William Hall**, editorial page editor of the *Lewiston* (Idaho) *Morning Tribune*. Hall said the bureau is trying to intimidate the press with a form letter routinely included with inmate mailings to newsmen. The form threatens a ten-year prison term for violating rules. Ironically, the rules were developed as part of a program to give media wider access to prisoners.

■ Confidentiality, conflicts of interest and case solicitation are to be put in focus by a nine-member committee set up to review the A.B.A. Code of Professional Responsibility. President **William B. Spann, Jr.**, outlined those priorities in naming members to the Special Committee for the Evaluation of Professional Standards, scheduled to make its report to the House of Delegates at the 1979 annual meeting.

■ United Nations Ambassador **Andrew Young** was right, but for the wrong reasons, when he proclaimed the innocence of the "Wilmington 10" defendants early this fall, say appeals attorneys for the nine black men and one white woman fighting North Carolina arson convictions. Young said they were convicted because their lawyers were unprepared. One of the attorneys says he's "absolutely off-base" in his charge.

Young

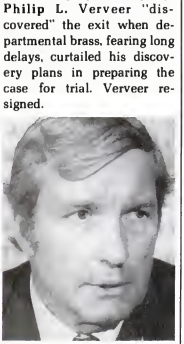
■ It wasn't election headquarters, but Attorney General **Griffin B. Bell** counted the votes after the Justice Department brought its first indictment of a federal agent, John J. Kearney of the Federal Bureau of Investigation. "The mail was against me 100 to one," said Bell. "Maybe my judgment was bad," said the former judge, who indicated earlier he may be reconsidering the decision to prosecute former F.B.I. and Central Intelligence Agency officials.

■ The nation is heading for a period of "legislative retribution" against homosexuals, predicts **James J. Brosnahan**, president of The Bar Association of San Francisco. He points to newly passed state and federal laws limiting gay rights in the name of "restoring morality" and denounces them as "incredible" discrimination on the basis of status.

■ Get a tradesman for a tort, suggests Chief Justice **Warren E. Burger.** After touring the Soviet Union, the jurist concluded the People's Court system, using plumbers, carpenters, and other laymen, offers an effective answer to American court backlogs. The Russian benches seat two laymen with each judge.

■ Solons should use a "fudge factor" in writing criminal laws, urges a 1977 graduate of the University of Michigan Law School, **Irving Seldin.** Since lawmakers expect their edicts to be broken, they should write them just a little stricter. Violations then would produce less social harm, he argued in *Michigan Law Review.*

■ The Justice Department team is minus a captain in its three-year-old antitrust suit against American Telephone and Telegraph Company. **Philip L. Verveer** "discovered" the exit when departmental brass, fearing long delays, curtailed his discovery plans in preparing the case for trial. Verveer resigned.



Percy

■ Organized crime has moved into the arson field, and evidence points to an interstate racket for insurance fraud, says Sen. **Charles H. Percy** (R-Ill.). Federally sponsored insurance may share the blame for encouraging the "epidemic," says the senator, calling for government investigation.

CIVIL RIGHTS

Bakke may be only the beginning

The Supreme Court heard arguments October 12 in a case that could have "as profound an impact on American society as any decided by the Supreme Court in years," one that "could dramatically alter the shape of civil-rights enforcement" for decades and mark "an important turning point in the cause of racial equality in this country."

That's what national commentators are saying about *Regents of the University of California* v. *Allan Bakke*, the "reverse discrimination" case that is bidding to bring to a head arguments over the legality of affirmative-action plans. Some say it will kill them off unless the Supreme Court reverses trial-court and Supreme Court of California verdicts in favor of Allan Bakke.

In fact, the decision probably will raise as many issues as it resolves. And a series of future related cases seems likely.

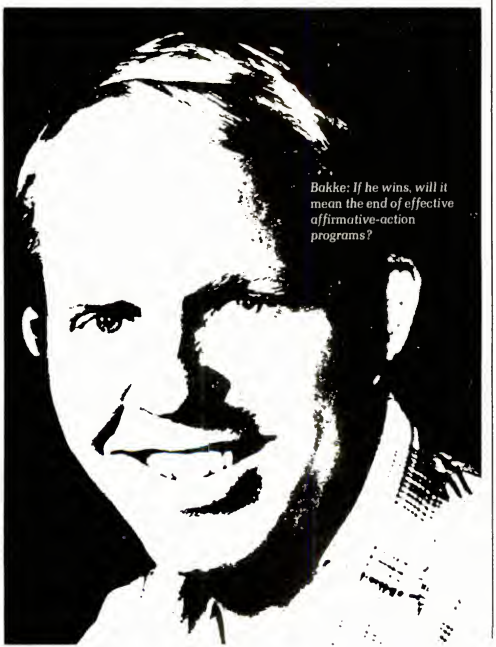
The long-awaited 'reverse-discrimination' decision by the Supreme Court might prove to be only the first of a long series.

Regents v. *Bakke* seeks a determination of whether, in reserving 16 of 100 seats in the University of California at Davis Medical School's entering class for "disadvantaged" students (who were invariably members of racial or ethnic minority groups), the school unconstitutionally violated Bakke's Fourteenth Amendment right to equal protection. Bakke, a white, was twice refused admission to the Davis medical school while minority-group members with lower grades and test scores than he were admitted. He is charging that this procedure constitutes discrimination based solely on race.

Bakke's efforts to force his admission to the school undeniably have created one of the biggest storms in the thirteen years since affirmative-action plans to aid minorities surfaced through civil-rights legislation and by executive order.

Supporters of the school include numerous old-line civil-rights organizations, a variety of educational associations and schools, and several legal groups, including the American Bar Association. They often argue that affirmative action will grind to a halt if Bakke wins his case. And they say that a Bakke victory would mean that minorities, particularly blacks, will lose the chance to make up for the effects of historic discrimination that has tended to leave them, as a group, near the bottom of the socio-economic ladder. Eighty-two organizations have joined in a total of thirty-five *amicus curiae* briefs on behalf of the school.

Bakke's supporters, including a few professional groups and a large number of white ethnic associations—Greek, Italian, Jewish, Polish, and Ukranian—tend to oppose the Davis plan on either of two grounds. One is a "two wrongs don't make a right" approach that says that past discrimination against minorities is not properly compensated for by now discriminating against the majority. The second argues that only nonracial means should be used to achieve the



Bakke: If he wins, will it mean the end of effective affirmative-action programs?

goal of bringing reasonable numbers of minorities into the professions. They urge the university to exercise other options, such as programs to identify, recruit, and remedially train disadvantaged students of all races or to create additional places in the medical school. Thirty-two groups and individuals have filed fifteen *amicus* briefs supporting Bakke's position in some way.

The suit highlighted a split between such groups as the National Association for the Advancement of Colored People and the National Urban League, which support the university plan, and traditionally liberal Jewish organizations, such as the Anti-Defamation League of B'nai B'rith, which backs Bakke.

The American Medical Association has not filed a brief on the case, but a variety of other medical organizations, including the American Medical Student Association, support the university. Within that profession, only the National Medical and Dental Association has openly sided with Bakke.

While proponents of affirmative action are talking in terms of the death of minority-assistance programs if Bakke prevails, there is some reason to suspect that any Supreme Court ruling may be narrow and less than a knockout punch to all forms of affirmative action.

Regents v. *Bakke* is far from a "clean" case in which an issue or issues are clearly delineated. Details of the operation of the Davis program that could affect a determination of whether it properly or improperly considered race in admitting minority-group members were lacking in lower-court arguments, and the Department of Justice, in its brief, cites the inadequacies in evidence and findings.

Justice is recommending that the judgment of the Supreme Court of California be reversed in finding against the constitutionality of the special admissions program and suggests that the case otherwise be remanded "for further appropriate proceedings to address the questions that remain open."

The possibility that the high court will send *Bakke* back should not be discounted. Four other *amicus* briefs, including those submitted by the National Association of Affirmative Action Officers and the National Conference of Black Lawyers, are urging the justices to remand.

If there is a high-court decision in *Bakke*, it will necessarily turn on the key point of whether the Constitution must be color blind now or only some time in the future, when the effects of past discrimination against blacks, Latinos, Indians, and others has been ameliorated.

The case also surely will hinge on whether the reservation of 16 per cent of the seats at Davis constitutes a quota and, if it is a quota, whether it is a constitutionally permissible remedial action.

Discussion of quotas inevitably occurs when affirmative-action plans are discussed, because the effort to bring "reasonable numbers" of minorities into occupations or professions requires an answer to "How many is enough?"

California's high court, like Bakke's brief to the U.S. Supreme Court, found that the Davis plan imposes a quota and comes down hard against it.

"No college admission policy in history has been so thoroughly discredited in contemporary times as the use of racial percentages," California Supreme Court Justice Stanley Mosk wrote for the majority. "Originated as a means of exclusion of racial and religious minorities from higher education, a quota becomes no less offensive when it serves to exclude a racial majority," he said.

Bakke's brief argues that the operation of the plan, in processing special admission plan applications until sixteen seats were filled, establishes it as a quota. Writing for the university in its brief to the U.S. Supreme Court, Harvard Law School Professor Archibald Cox, former Watergate special prosecutor, says the plan is not a quota because it sets neither a floor nor ceiling for total minority-group admissions and because no unqualified persons are admitted under it simply to fill a given number of seats. "The Davis program sets a goal, not a quota," the university argues.

The Department of Justice, while backing affirmative action in general and the Davis plan specifically, stops short of attempting to define how far

Attorney General Griffin B. Bell (left) and Solicitor General Wade H. McCree release the government's amicus curiae brief in the Bakke case on September 19.

these programs may go. Justice's brief speaks of "reasonably selected numerical targets for minority admissions that can be useful as a gauge of the program's effectiveness."

Other *amici*, including the A.B.A., are consonant with Cox in supporting goals but not quotas. None of the university's friends are calling its program a quota, although it may be that some would support it however it were defined.

The presence of the volatile quota question in *Bakke* is but one consideration that made the case notorious long before it was even argued. Another is the intense argument over precedents. Few court cases have dealt with situations really close to that of *Bakke*, and attorneys for Bakke or the university put much effort into arguing the parallels or the applicability of various school-desegregation or employment-discrimination cases to the Davis program.

Widely cited in briefs is the U.S. Supreme Court's 1971 decision in *North Carolina State Board of Education* v. *Swann*. The A.B.A. quotes from *Swann* to support the idea that "just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

But the Davis medical school was founded in 1968 and has no past history of discrimination itself. A good deal of lower-court argument centered on whether the school is entitled to consider race for remedial purposes as though it were making up for past bias.

Bakke's claim comes to the Supreme Court upheld by two lower courts. Both the superior court that initially tried his complaint and the Supreme Court of California, which took it directly on appeal, found that the university's program could not pass constitutional muster.

The trial court said the program purported to be open to "educationally or economically disadvantaged" students but found that only minority-group members were admitted under it and that it was, therefore, discriminatory. The Supreme Court of California affirmed this judgment 6-1, noting in the majority opinion written by Mosk that "it is clear that the special admission program denies admission to some white applicants solely because of their race."

Cox argues that race-sensitive measures were employed because they were found to be necessary and not from a lack of concern over consequences that may inhere in considering race even for remedial purposes.

Distinguishing between "benign" and "invidious" discrimination figured in the dissent of California Justice Mathew O. Tobriner, who scored the majority of his court for failing to make this distinction and for viewing the minority-group members admitted as "less qualified" than rejected whites.

The California high-court majority anchored their ruling in favor of Bakke on an insistence that the Fourteenth Amendment literally applies equal protection to "any person," while Tobriner noted that its primary purpose, historically, was to preclude discrimination against blacks.

While the university's brief argues that a program considering race is the only realistic answer to the effects of past racial bias, Bakke's lawyers are arguing that no one knows if alternatives to a quota will work because the school did not attempt to try any.

Bakke's argument insists that "the concept of individual freedom is based upon the concept of individual achievement" and that the "aim of affirmative action is to enable persons to advance in society on the basis of individual merit." There is no group right to racial proportionality, he insists.

Cox charges that the quota question is a "red herring," raised for emotional and not analytical purposes. He similarly argues that pleas for the defense of meritocracy are false because objective criteria for determining individual achievement, such as test scores, do not correlate especially well with either school performance or successful medical practice.

The Cox brief strongly attacks the California Supreme Court ruling for its "fundamental error" of treating the injury to Bakke as equal with the injury suffered by "a member of a traditionally alienated minority." Cox argues that the California court did not examine means at all but merely substituted ends of its own for those of the medical school.

In the 1974 case of *DeFunis* v. *Odegaard*, a similar matter involving alleged reverse discrimination in law-school admissions, the Supreme Court did not pass on the question on grounds that it had become moot. In *DeFunis*, Justice William O. Douglas dissented from the disposition, however, insisting that "the equal protection clause commands the elimination of racial barriers, not their creation in order to satisfy our theory as to how society ought to be organized."

Mosk cited Douglas in writing that "to uphold the university would call for the sacrifice of principle for the sake of dubious expediency and would represent a retreat in the struggle to assure that each man and woman shall be judged on the basis of individual merit alone, a struggle which has only lately achieved success in removing legal barriers to racial equality."

The "dubious expediency" to which he referred included university arguments that minority enrollment would increase racial diversity in the medical profession, create "role models" for other members of minorities, increase the number of physicians serving minority communities, and create a class of minority doctors possessing greater rapport with minority patients.

Cox denies Mosk's suggestion that there is no guarantee that minority doctors will improve minority health care or that a nonracial system of training all medical students to be sensitive to the medical needs of minorities might be "more directly effective."

In short, the California decision, like Bakke, calls for color blindness now. The university, Tobriner in his dissent, and various prouniversity *amici* argue that the consideration of past discrimination still can and must be taken into account.

Justice concludes that the Supreme Court of California should be reversed in its finding against the program. But, like those few *amici* who urged the court to send the whole case back for reconsideration and clarification, Justice argues that the question of whether Bakke should be admitted should also be remanded. The government says both lower-court decisions were addressed to the wrong issue—*whether* race was used in the program. Justice says the real question is *how* race was used, and why.

Should the members of the Burger Court agree with the remand argument, the divisive question of "reverse discrimination" will be left to simmer a while longer while lesser courts wrestle with it again. If the high court does decide, the issue may boil over in a flurry of new cases that seek clarification of issues that *Bakke* may prove unable to resolve.

In brief

Death penalty OK'd

The California State Assembly has restored the death penalty by overriding Governor Edmund G. Brown, Jr.'s veto by a vote of more than two to one. The new law calls for the death penalty for treason and fifteen categories of murder but allows the jury to reduce the sentence to life in prison in case of mitigating circumstances.

Victims studied

Chances are 50–50 that a murder victim in New York City had a prior arrest record, the city's police department reports. Its study also shows that almost half of all murder victims had "detectable levels of alcohol, narcotics, or both in their blood at the time of death." The police say the information will be helpful to "flesh out a portrait of murder victims and potential victims."

Fewer solo firms

A market-research firm searching for a market has come across an interesting trend. Frost & Sullivan, Inc., says that the one-man law firm is disappearing, but the corresponding rise of partnerships has produced a "virgin market" for automated data- and word-processing services.

Law schools costlier

Law school tuition has risen 21 per cent in the last two years, says the *New York Law Journal*. It surveyed twenty law schools and found that eighteen have raised the tuition this fall. The most expensive? Stanford Law School at $4,846 per year.

Small-claims aid

New York City's Citibank and the New York Public Interest Research Group have launched a project to help persons collect judgments won in the city's small-claims courts. In addition to providing attorneys with expertise in collection matters, the bank also donated $35,000 to hire a full-time attorney to run the project. It is estimated that there are 4,000 persons with unsatisfied small-claims-court judgments.

Business legal costs

Legal costs for large corporations were only a "very small fraction" of gross sales last year, a study by the legal consulting firm of Daniel J. Cantor & Co., Inc., concludes. For every $1 million of gross sales, ninety major North American companies spent an average of $1,780 for legal counsel, the firm says in its *1977 Economic Study of Corporate Law Staffs*.

School malpractice?

A $5-million "educational malpractice" suit was dismissed last month by a New York Supreme Court justice because he could find no precedent in the state for holding a school system liable for failure to educate a student. But the justice, Paul J. Baisley, said the case should be reviewed by a higher court because of "the grave policy questions posed by the issue."

Drug crackdown

The Department of Justice is teaming up Federal Bureau of Investigation agents with agents from the Drug Enforcement Administration to combat drug trafficking by organized crime in the nation's three largest cities. The teams began operating in New York City, Chicago, and Los Angeles in late September.

Button-ban backed

A California appellate court, taking a cue from the U.S. Supreme Court, has ruled that inmates in the state's Soledad prison who belong to a prisoners' union may not wear union buttons. In light of the ruling by the high court in *Jones v. North Carolina Prisoners' Labor Union*, the state court said the inmates cannot claim that a ban on the buttons violates the First or Fourteenth amendments.

Can teachers who don't teach be successfully sued for "educational malpractice"?

Clients in the sun

Some New York law firms are following their elderly clients to Florida to assist in trust and estate planning. Several firms have opened branch offices in Florida. Because of the threat of tax changes in New York estate law, some New Yorkers are changing their legal residences to Florida, and the firms say they don't want to lose the business.

Terror court urged

The creation of an international criminal court to try terrorists and hijackers was supported by the recently concluded World Law Conference in Manila. The conference wants the United Nations to start discussion on setting up the court. The conference also urged the U.N. to finance the development of an "international legal computer language" to be used by lawyers of all nations to resolve worldwide legal questions.

Big prepaid plan

Twenty-six unions and several insurance companies are to launch a large prepaid-legal-services program on the East Coast next month. Called Open Panel Research Project, the program is believed to be the first to provide data on the use of open-panel prepaid legal services under actual conditions. There is no cost to employees, unions, or employers. The insurance companies and other interested groups are funding the project, which expects to have an enrollment of two million.

SECURITIES

Bond lawyers feeling hot breath of S.E.C.

The once-quiet, $60-billion-a-year municipal-securities market, one of the last regulatory frontiers, is being staked out by the Securities and Exchange Commission and Congress.

Just as corporate lawyers are feeling S.E.C. pressure in the way of accountability, municipal-bond lawyers also are feeling the sting of S.E.C. court suits.

And although the S.E.C. has less of a regulatory mandate over municipal securities than corporate securities (municipals were almost entirely exempted from the securities laws mainly because of constitutional questions), the commission's prosecutions have a familiar ring.

The pressure points the commission is using in the municipal-securities field are the same ones that have proved to be the undoing of corporations and their officers and directors—the disclosure and antifraud provisions of the securities laws, the one major section that applies to municipal-securities transactions.

As Washington, D.C., lawyer Francis R. Snodgrass, former associate director

Commission holding attorneys responsible for disclosure.

of the commission's Division of Regulations, puts it, "S.E.C. administrative law, developed over the last forty years in the corporate area, is being applied to municipal securities."

At the same time, the commission, through enforcement actions, is expanding the liability for bond lawyers.

The bond lawyers see their role as limited, and confined to issuing opinions on the validity of securities and certification of an issue's tax-exempt status. The S.E.C., however, is now holding lawyers responsible for misstatements and omission of "material facts" to investors.

Says Donald J. Robinson, a New York City attorney, "I am particularly concerned that the commission is developing standards which are difficult, if not impossible, to comply with and which appear to reflect a lack of knowledge of the role of counsel."

Williams: He wants congressional action on mandatory disclosure in municipal-securities transactions.

As an example, he cites a case involving a default on bonds issued by a water-reclamation district in California (*S.E.C. v. Reclamation District 2090*). The commission won an injunction against the district's attorney in connection with a legal opinion on bond-anticipation notes.

According to Robinson, "Although the opinion was limited to the validity of the notes, the commission charged that it was 'misleading' in its failure to treat factors bearing on the financial ability of the issuer to meet its obligations, such as revenues and other sources of funds as well as the insufficiency of the district's tax base."

But, despite the objections, the S.E.C. is continuing to pursue the concept.

In its August report on New York City's financial problems, the commission noted, "Bond counsel, when on notice of circumstances that called into question matters basic to their opinions, should have conducted additional investigation."

Concerning disclosure, the report declares, "Bond counsel, who continued

How bond lawyers can protect themselves

Even though the liability of municipal-bond lawyers is on the rise, there are some steps that can be taken to lessen the risk, according to attorney Donald J. Robinson of New York.

As a first step, Robinson recommends that a bond lawyer "should at least be satisfied" that:

- "The participants understand their obligations under the securities laws, including their investigatory obligations" and they are "attempting in good faith to satisfy those obligations."
- He "has no notice of material misstatements or omissions in the offering statements or any other securities laws violations in connection with the transaction."

In addition, Robinson advises, "Broad statements as to adequacy of the information should be avoided. Any statement in this regard should be limited to statements that counsel is not 'aware' of any misstatements or omissions after conducting certain investigatory procedures. These procedures should be described with specificity, and their description should eliminate any impression that they suffice to discharge the entire investigatory obligation."

He also recommends that, if a lawyer's role is to be limited, "he should specify such limitations not only in the opinion which he renders but also in a retention letter given to his client at the outset. Of course, this should also be disclosed in the official statement."

If these rules are followed, Robinson says, "the danger that counsel retained in connection with issuance of municipal securities will be held liable for the faulty performance of duties they never intended to assume will be minimized, but not eliminated."

In addition, a report by the Special Committee on Lawyers' Role in Securities Transactions of the Association of the Bar of the City of New York, also may be helpful. The report appears in the July 1977 issue of the *Business Lawyer*, published by the Section of Corporation, Banking, and Business Law of the American Bar Association.

with their engagement having knowledge of information material to investors, should, in view of the particular circumstances, have taken reasonable steps to satisfy themselves that such material facts were disclosed to the public."

Investors, too, are going to court more often. Speaking generally of the change in climate, Robert W. Doty, general counsel for the Municipal Finance Officers Association, points out, "Investors are now aware that they have very effective legal remedies and they are exercising them more often."

Why all the interest in the municipal-securities market? Experts agree on several reasons: New York City's brush with bankruptcy, which heightened fears of default; the entrance of smaller, less sophisticated investors into the market; and the growth of the market itself in the last twenty-five years. According to an M.F.O.A. estimate, annual sales in municipal securities are $60 billion annually. The association pegs comparable corporate-securities sales at $35 billion annually.

Congress also has shown some interest in tighter regulation of the municipal-securities market. In 1975 it passed the Securities Acts Amendments, which required brokers and dealers in municipal securities to register with the S.E.C.

And last year, Sen. Harrison A. Williams, Jr. (D-N.J.) introduced a bill calling for mandatory disclosure in municipal-securities transactions.

The bill was not enacted, but a revised bill is expected to be introduced some time this month. In addition to giving disclosure requirements, the bill will "spell out the responsibilities and liabilities of lawyers, accountants, issuers and underwriters" in transactions, according to Howard Minell, assistant counsel to the Senate committee on Banking, Housing, and Urban Affairs.

Mandatory-disclosure legislation is opposed by the National League of Cities and the M.F.O.A., among others. They say that voluntary disclosure has increased dramatically and note that securities are becoming virtually unmarketable unless disclosure is made according to the M.F.O.A. guidelines.

And Richard West, chairman of the Municipal Securities Rulemaking Board, a self-regulatory body for bond dealers and brokers created by the 1975 Securities Acts Amendments, thinks that a federal disclosure law for municipals is unwise.

West takes the position that there are "relatively few municipalities with serious financial difficulties." He believes proposed legislation "would subject the great majority [of municipalities] with an exemplary record of repayment to unnecessarily complex and costly standards."

The arguments over regulatory legislation and lawyers' responsibility are old ones for other sectors of the bar. But now bond lawyers must ask themselves, "Does self-regulation really work, and does a lawyer have obligations to others in addition to his client?"

THE ORGANIZED BAR

Nader group blasts bar associations

Ralph Nader's Public Citizen organization has zeroed in on bar associations, attacking what it sees as the high cost of legal services, self-serving bar

Study faults bars for self-serving conduct.

conduct, a "crisis in competence," and failures in *pro bono* activities.

These charges are made in *Bringing the Bar to Justice: A Comparative Analysis of Six Bar Associations*, which calls for pressure by citizens and concerned lawyers to reform the organized bar.

Based on observations of the Baltimore, Boston, Massachusetts, New York, Philadelphia, and Washington bars, the study was written by attorneys Lynn Bernabei and Sharon Fisher and Mark Green, director of Public Citizen's lobbying group, Congress Watch.

To abolish what the authors describe as self-serving bar conduct and high legal fees, they propose the elimination of obstacles to paralegal employment, delawyering of routine tasks, and an end to strictures on prepaid-legal-services plans.

Also criticized in the study are political activity by the bar and the way it handles discipline, which, the study says, are geared toward preserving lawyers' economic prerogatives and boosting lawyers' incomes but do little to protect the public.

According to the study, citizen pressure can force the allocation of more bar resources to *pro bono* work. And in general it sees the inclusion of nonlawyers on bar governing and policy-making bodies as the key to reform.

"Bar groups and lawyers," says the report, "will apparently see the light only if they feel the heat."

CRIMINAL JUSTICE

Lawyers helping cops through legal thickets

Unemployed lawyers who see themselves as a glut on the market may take heart from a slow but steady trend in police departments across the country.

Police are recognizing a need for their own legal advisors, persons to whom they can take questions on cases still under investigation and not yet ready for prosecutors.

There now are some 320 such consulting units in the United States, most in municipal departments. Attorneys in the units serve three major functions—advising the chief, teaching recruits, and fielding legal questions from persons on duty. Some also prosecute department discipline cases.

The impetus for starting these units most often is that a department "runs into procedural problems," says Thomas A. Hendrickson, assistant director of the International Association of Chiefs of Police.

Either the police find they cannot get through to prosecutors, who are concentrating on already developed cases, or they don't seek legal advice—and their cases suffer from procedural errors.

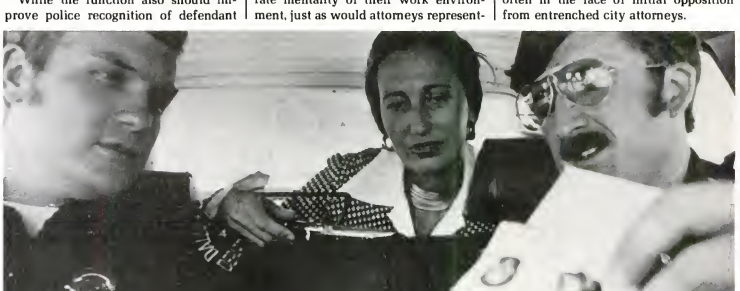
Departments that have established legal liaison units have found them valuable, says Hendrickson. Most have been set up with grants from the Law Enforcement Assistance Administration. But over the past two years, L.E.A.A. money for the units has been curtailed, so departments now are financing units on their own.

Some advisors spend 90 per cent of their time with administrators, while others work almost exclusively with patrolmen or line officers. In the training programs and in responding to specific legal problems in pending cases, the advisors' goal is to help improve

rates of successful investigation and conviction. And they help police avoid procedural violations that would jeopardize cases.

While the function also should improve police recognition of defendant constitutional rights, Hendrickson notes that the primary responsibility of the advisor is to the department, and he says the lawyers tend to assume the corporate mentality of their work environment, just as would attorneys representing large conglomerates.

If the legal-advisory units are thriving, they apparently are doing so without the support of the organized bar, and often in the face of initial opposition from entrenched city attorneys.



A police legal advisor in Dallas. In-house legal help on procedural questions is a growing trend.

Dallas legal unit focuses on correctable failures

Before the current legal liaison division was instituted in the Dallas Police Department, warning signals indicated that problems were developing.

There had been an increase in the number of civil-rights lawsuits filed against police. Grand juries were refusing to indict in 29 per cent of the cases they received. Even with indictments, 20 per cent of felony cases ended in dismissal.

The department had a legal division, but its duties were oriented toward the command structure in the force. The attorneys advised the chief and supervisory personnel, dealt with the city attorney and other prosecutors, and assisted in training programs and in defending the department in civil-rights cases.

In 1973 the legal staff was expanded and restructured to focus on "legal failures of a correctable sort—improper searches, poorly drafted documents, 'bad warrants'."

Now the unit has five attorneys, including Director Edwin Heath, who also is a sworn police officer. The department has 2,050 sworn officers and 350 nonsworn personnel. The lawyers are available to any police officer on a 24-hour-a-day basis, taking most questions on the phone but also seeing patrolmen in their offices. They review every case completed by the police before it is sent on to a prosecutor. And they assist patrolmen in drafting warrants and affidavits.

In addition to the one-on-one work with patrolmen, the attorneys provide training for both veteran officers and new recruits. The staff keeps patrolmen up to date on changes in statutes and court interpretations of the law and continues to advise administrators.

While the attorneys work with police divisions, all but Heath are assigned to the department from the city attorney's office.

The lawyers receive as many as 100 calls per day from patrolmen, says Heath. Many involve search and seizure questions, particularly concerning vehicle stops, where police are less sure of their legal ground, he says. Other questions are about whether the evidence gathered is sufficient and whether further investigation is needed. A few questions deal with *Miranda* warnings and the exclusionary rule. Because Texas adopted statutes in these areas in the 1920s and 1930s, police generally understand the requirements.

Rarely, and only in a marginal way, the lawyers are involved in police discipline matters. Heath says an active role would discourage police from discussing their problems openly with the liaison attorneys. Police in Dallas do not have easy access to prosecutors, since the district attorney's office is understaffed, says Heath. It is important that officers feel legal advice can be provided efficiently and harmoniously by the liaison unit, he says.

What has been the result? Heath reports grand-jury no-bills dropped to 23 per cent within four months, and, by July 1975, no-bills resulting from police error were down to 4.3 per cent. At the same time, dismissals caused by police error declined to 2.6 per cent.

Hendrickson says he knows of no case in which a bar association has even shown much interest in the legal-consultant program. Yet, he notes, the American Bar Association Standards for Criminal Justice Relating to the Urban Police Function cite a need for more such units. The standard urges bar association support to establish them.

City attorneys have not always been receptive to advisor programs. They fear confusion may stem from multiple, and possibly varying, sources of legal information for police. But Hendrickson says that, by making a unit a division of the city attorney's office, this problem frequently has been solved.

Even if the lawyer police consultants tend to see themselves more as cops than as advocates for citizen rights, their presence on the forces should go a long way toward keeping police work within at least the letter of the law.

More people can peek at grand-jury material

The changes in the rules for federal criminal procedure that took effect this month aren't quite what the Supreme Court justices had in mind when they issued their version last year—but they still may cause defense counsel a good deal of grief.

New federal criminal procedure rules also OK phone-in search warrants.

As modified by Congress, the new rules:

- Permit some disclosure of grand-jury material to nonattorney government personnel.
- Authorize obtaining warrants by telephone.
- Establish a deadline for filing petitions to remove cases from state to federal courts.

The grand-jury-secrecy issue turned out to be the thorniest of the rule amendments. Under the old rules, disclosure without a court order could be made only to government attorneys "for use in the performance of their duties."

The new rule broadens the range of personnel who may receive grand-jury material to allow prosecutors to consult about it with experts outside their legal staffs. The rule does require prosecutors to promptly inform the appropriate district judge after disclosure is made. The material then may be used in civil matters such as tax cases, but only after civil court proceedings have been instituted.

The Supreme Court proposal would have permitted disclosure to nonlawyer government personnel without restrictions on subsequent use of the material.

The new telephone search-warrant procedure is adapted from systems tried successfully in Arizona and California. In its approval of the idea, Congress specified that all telephone testimony supporting the warrant request must be preserved verbatim, though not necessarily on tape.

In seeking removal of cases from state to federal courts, attorneys now are required to file petitions either thirty days after arraignment or at any time before trial, whichever is earlier. The Supreme Court has sought a ten-day maximum after arraignment—but attorneys argued that ten days was not realistic, and the American Bar Association wanted the amendment to permit filing up to fifteen days in advance of trial. Now, even though a petition is filed, there will be no stay on state proceedings.

Under the old rules, petitions could be filed anytime before trial, and filing resulted in automatic stay of state proceedings.

A change the Supreme Court proposed but the A.B.A. fought vigorously would have reduced and equalized the number of peremptory juror challenges for defense and prosecution. Congress denied any adjustment, retaining an allotment weighted for the defense.

A final change that was approved essentially as the court wrote it requires attorneys to file motions for special findings of fact before the court issues general findings. Previously such motions could be made after general findings were issued.

While the changes are not as extensive as those the Supreme Court wanted, they will put new pressures on judges and counsel. The telephone warrant procedure, for example, could initially prompt more suppression motions, at least until attorneys become accustomed to it. And the removal-petition deadline should spur defense attorneys to develop their strategy early.

DELIVERY

Legal clinics: Now or never?

It may be make or break time for legal clinics.

Until this year most of the legal clinics that opened their doors closed them not too long afterward, and clinic operators generally blamed the inability to advertise for the failure of their efforts to deliver bargain legal services to the middle class.

But there appears to be more to clinic success or failure than publicity. Even before the Supreme Court relaxed the absolute ban on advertising, one legal clinic, Cawley, Schmidt & Sharrow in Baltimore, did well enough to expand to sixteen offices in its first year of existence. (See "National law firm era dawns," page 1361.)

With advertising bans crumbling, clinics have lost their big excuse for failure.

Meanwhile, the 59th Street Legal Clinic in Philadelphia has not found advertising an answer to its woes. Opened last November by the Philadelphia Bar Association with much fanfare and a $60,000 grant from the American Bar Association Special Committee on the Delivery of Legal Services, the clinic faltered badly. During its first six months, the clinic handled 176 cases, bringing in revenues of slightly more than $9,000, while expenses, including start-up costs, were more than $29,000.

In late March the clinic began newspaper advertising. But there was no dramatic increase in client load, and the clinic lost about $2,000 in May. However, during the A.B.A. annual meeting in August, Philadelphia bar Chancellor Bernard M. Borish said the trend of operation is good. The clinic is moving toward self-supporting status, he said, although much more slowly than was anticipated.

Another bar-sponsored clinic that has advertised from the start, the South Shore Law Office in Chicago, appears to be doing better. It opened in May and

South Shore Law Office in Chicago: Advertising has helped make it a success.

handled 100 cases, netting $8,000 for the first two months.

The South Shore clinic is sponsored by the Chicago Council of Lawyers, Chicago-Kent College of Law, the South Shore National Bank, and the South Shore Commission.

Apparently, the clinic field as a whole is being influenced more by the Baltimore and Chicago experiences than by that of Philadelphia. The National Resource Center for Consumers of Legal Services says one or more new clinics are opening per month. The center also reports that in the past year only one clinic has failed.

The sudden increase in the number of clinics and the reduction in clinic failures suggest that new approaches to clinic operation are being tried.

Now that advertising can be neither a barrier nor an excuse, these operations may provide a clearer indication of just what it takes to make a clinic a success.

National law firms

Continued from page 1361.

"We don't intend to join the advertisers," says Slate. "We don't believe in it." He explains that client groups hear of the firm by word of mouth and seek it out on their own.

Noting that prepaid-legal-services plans and legal clinics are the immediate competition for the Murphy and West referral panel, Slate says the firm probably will begin a prepaid offering of its own "down the road."

Bidding to join Murphy and West in the marketplace as a true national law firm is the Legal Clinics of Cawley, Schmidt & Sharrow, P.A. Opened in Baltimore in August, 1976, the firm had grown from a single office to sixteen offices by September of 1977. And the new offices are not merely in and around Baltimore. One is in the District of Columbia, one is in New Jersey, and two are in Massachusetts. Others are to open soon in New York and Virginia, and partner William R. Schmidt III says he would like to have about thirty offices open by year's end.

"We intend to spread ourselves across the country," adds partner Ronald M. Sharrow, who defines their goal as "making Cawley, Schmidt & Sharrow the H&R Block of legal services." The partners are keenly optimistic about their prospects, and Schmidt flatly predicts that "in five years, all you'll see is major law firms and clinics."

Advertising, or at least publicity, figures in their plans. But for now the firm is taking a cautious approach. To avoid uncoordinated publicity, it has retained a Virginia public-relations firm to develop a firm identity and to research the market before further advertising is launched. As Sharrow puts it, "When we gain some size, we can do serious advertising." He says he envisions "very dignified" national ads for the firm, as well as small-scale local ads for each new office as it is opens.

While Sharrow observes that paid ads help "keep your name in the eyes of the public," he says the clinics are getting business without ads—pointing out that up to 80 per cent of their clients come in on referrals.

"A clinic has to have exposure," he notes, "but advertising is not the only kind of exposure. There is a tremendous value to newspaper stories. Many of our early clients heard about us on TV or in

newspapers. Then they told others about us."

The firm received a lot of news coverage because of its conflicts with the Maryland bar. Says Sharrow: "They tried to stop us, but everything they did helped us. We can't thank the bar enough for the publicity."

In line with the theory of clinics, Sharrow insists that they need efficient organization as well as exposure to the public. He says the major advantage of multiple-office operation is mass buying of everything from office supplies or sophisticated equipment to accounting services and malpractice liability insurance for the firm's lawyers.

But problems also come with rapid expansion and multilocation operation. Sharrow admits that the three original partners (he, Schmidt, and Linda C. Cawley) have been "hard pressed" to oversee the operation, despite having spent most of a year before the first office opened perfecting work programming that allows a relatively small number of persons to handle a high volume of cases efficiently.

The clinics have been getting additional help by hiring experienced lawyers to run new offices, although, Sharrow says, the firm generally hires only relatively inexperienced lawyers to staff them.

Because the job market for many young lawyers is rather tight, the clinic has few paralegals and opts instead for additional lawyers, who, Sharrow says, are not necessarily more expensive to hire and are more versatile because they can go to court if needed and can do more-intense research.

Theory says a clinic has to be organized to process efficiently routine services that can be standardized, but Cawley, Schmidt & Sharrow does not restrict itself to simple wills, uncontested divorces or real estate closings. It may take almost any kind of case, including a criminal case, Sharrow says, as long as the matter is not so complex that the clinic's system cannot be applied to it.

Schmidt notes that, in part, handling a variety of cases is just good client relations, because occasionally a person for whom the clinic has handled a routine matter asks them to take on something a bit more complicated. "With our growth" he says, "we have added different types of lawyers to the firm, and they give us the ability to handle less-routine cases." But he estimates that 90 per cent of all cases are standard ones.

Size helps the Cawley, Schmidt & Sharrow clinics provide other services, too. Schmidt notes that the lawyer's ethical obligation to attempt to bring about reconciliation in divorce cases often is handled quite perfunctorily in many law offices. But in each of their clinics, he says, there is a social worker on hand for counseling in divorce cases, drug-abuse problems and other human-relations difficulties that may bring a person to a lawyer's office.

Schmidt also notes that, as the offices have proliferated across state lines, the partners have begun to develop more *pro bono* cases. Also in the formative stage is a prepaid-legal-services plan.

"Recently we reduced our fees for some services," reports Schmidt, explaining that, "as we get larger, we get more efficient, and we found that we could afford to do so." But other aspects of Cawley, Schmidt & Sharrow are part of a constant formula. Each of the offices is a shopping-center storefront, is open evenings and weekends, and takes credit cards in payment for services.

In the first year, the clinic offices served thousands of persons, gaining referrals from early clients as well as from larger law firms and even judges, Sharrow reports. "These are fresh dollars in the legal marketplace," he adds.

Sharrow underscores the importance of the attitude lawyers bring with them into clinic-style practice. He says clinics need lawyers with idealism who want to help people—but not at the expense of the firm's profitability.

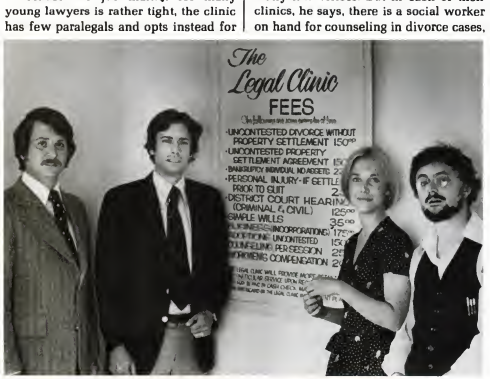
"One clinic office is not profitable," he declares flatly, "but in a group of four or more offices, clinics can really perform a needed service *and* make a lot of money."

Sharrow says he would "like to see sole practitioners stop fighting the clinic idea and join it, but I also want to see them do it well and be successful." He admits there is a potential for abuse in the clinic field today because "someone can open a clinic, or an office that they call a clinic, rip people off for a time, and give clinics a bad name."

Clinics, he notes, already have a weak image simply because more have failed than have survived.

However, that may be changing. While no one else seems to be having the degree of success that Cawley, Schmidt & Sharrow is enjoying, a recent survey by The National Resource Center for Consumers of Legal Services shows that there has been a rush of interest in clinics this year and that new ones are opening almost monthly. Even more significantly, only one clinic closing has been reported since mid-1976.

With that kind of success, it seems certain that others soon will be jumping in on what appears to be the beginning of a new era of national law firms.



Legal Clinics of Cawley, Schmidt & Sharrow partners (from left) David Ellerton, Richard Nettler, Linda C. Cawley, and William R. Schmidt III: Are they the wave of the future?

Major Legislation of Interest to Lawyers

95th Congress, First Session

Bill Description	House Status	Senate Status	ABA Position
Additional Judgeships. (HR 7843, S 11, with amendments)Create additional district and circuit court judgeships.	Pending in Judiciary Committee	Passed S 11, amended, 5/24/77	Supports additional judgeships
Administrative Procedure Act Amendments. (HR 3564, 7204; S 1720-21) Proposals to improve administrative procedures.	Pending in Judiciary subcommittee	Pending in Judiciary subcommittee	Supports administrative process improvements
Award of Attorneys' Fees. (HR 8798; S 270) Permit awards of attorneys' fees in federal administrative and judicial review proceedings.	Judiciary subcommittee approved 7/27/77	Judiciary Committee failed (8-8) to approve S 270 8/4/77	Supports
Bankruptcy Law Reform. (HR 8200) Establish a uniform law of bankruptcy.	Judiciary Committee reported HR 8200, with amendments, 9/8/77	No bills introduced	Supports several principles of bill
Consumers. (S 1262; HR 6805) Consumer Protection Act; (S 957; HR 2482) Consumer Controversies Resolution Act.	Government Operetions Committee reported HR 6805 5/17/77	Governmental Affairs Committee reported S 1262 5/16/77; S 957 referred to Judiciary Committee 6/27/77	Supports independent consumer agency; supports providing funds to states for resolution of consumer controversies
Direct Election of President and Vice President. (S J Res 1, *et al.*) Provide for direct popular election of President and Vice President.	Pending in Judiciary subcommittee	Judiciary Committee approved 9/15/77	Supports
Federal Criminal Code Revision. (HR 6869; S 1437) Revise 18 USC; codify, revise, and amend federal criminal laws.	Judiciary subcommittee began hearings 9/15/77	Judiciary subcommittee approved 8/5/77	Supported S 1, 94th Congress, with amendments, as basis for legislation
Financial Disclosure. (HR 1, *et al.*; S 555, with amendments) Provide for financial disclosure by high-level executive, legislative, and judicial officials.	Judiciary subcommittee began markup 9/13/77	Passed S 555, amended, 6/27/77	Supports in principle
Grand Jury Reform. (HR 94; S 1449) Provide for reform of grand jury system.	Judiciary subcommittee began hearings 3/17/77	Pending in Judiciary subcommittee	Supports in principle
Judicial Tenure. (HR 1850, 9042; S 1423) Establish a Council on Judicial Tenure.	Pending in Judiciary subcommittee	Judiciary Committee held hearings 9/14/77	Supports in principle
Legal Services Authorization. (HR 6666; S 1303) Renew authorization of Corporation, remove program restrictions.	Passed HR 6666, amended, 6/27/77	Human Resources Committee reported 5/16/77; on Senate calendar	Supports
Magistrates. (HR 7493; S 1613) Expend jurisdiction of magistrates.	Pending in Judiciary subcommittee	Passed S 1613, amended, 7/22/77	Supports
National Court of Appeals. (HR 3969) To establish a National Court of Appeals.	Pending in Judiciary subcommittee	No bills introduced	Supports only reference jurisdiction
National Institute of Justice. Establish federal legal research institute.	No bills introduced	No bills introduced	Supports
No-Fault. (HR 6601; S 1381) Establish national standards for state no-fault benefit plans.	Commerce subcommittee concluded hearings 7/22/77	Commerce Committee concluded hearings 7/20/77	Opposes
Special Prosecutor. (S 555, Title I; HR 2835) Provide for the appointment of a special prosecutor in appropriate cases.	Judiciary subcommittee held hearings 5/18/77	Passed S 555, amended, 6/27/77	Supports temporary special prosecutor
Victims of Crime. (S 551; HR 7010) Provide grants to states for payment of compensation to victims of certain crimes.	House began consideretion 9/14/77	Pending in Judiciary subcommittee	Supports

Governmental Relations Office, American Bar Association, as of September 15, 1977.

American Bar Association

BULLETIN BOARD

Calendar of Association Meetings

Annual Meetings

1978—New York City, August 3–10
1979—Dallas, August 8–15
1980—Honolulu, July 30–August 6
1981—Miami Beach, August 5–12
1982—San Francisco, August 4–11
1983—Atlanta, July 27–August 3
1984—Chicago
1985—Saint Louis
1986—New York City
1987—San Francisco

Midyear Meetings

1978—New Orleans, February 8–15
1979—Atlanta, February 14–21
1980—Chicago, January 30–February 6
1981—Houston, February 4–11
1982—Chicago, January 27–February 3
1983—New Orleans, February 2–9
1984—Las Vegas, February 8–15

Judicial Training and Education

FOLLOWING is the 1977 announced judicial education calendar of the National College of the State Judiciary:

October 30–November 4, "Search and Seizure," Specialty.
November 6–11, "Sentencing Misdemeanants," Specialty.
November 6–11, "Evidence," Graduate.
November 13–18, "Administrative Law," Specialty.
November 13–18, "The Decision-Making Process," Graduate.
December 4–16, "The Judge and the Trial," Graduate.
December 4–9, "Court Administration," Specialty.
December 11–16, "Administrative Law," advanced course.
December 11–16, "Alcohol and Drugs," Specialty.

The National College of the State Judiciary admits participants of any race, color, national or ethnic origin, sex, age, or handicap to all sessions and programs. All courses are held in the Judicial College Building on the campus of the University of Nevada, Reno. Associated one-week sessions are scheduled consecutively to allow judges to attend more than one session, thereby reducing transportation costs, tuition, and conference fees. Further information may be obtained from Judge Ernst John Watts, Dean, National College of the State Judiciary, Judicial College Building, University of Nevada, Reno, Nevada 89557 (telephone 702/784-6747).

Notice by the Board of Elections

THE FOLLOWING jurisdictions will elect a state delegate for a three-year term beginning at the adjournment of the 1978 annual meeting and ending at the adjournment of the 1981 annual meeting: Arizona, Connecticut, District of Columbia, Illinois, Iowa, Maine, Michigan, Mississippi, Montana, Nebraska, New Jersey, Oklahoma, Puerto Rico, South Carolina, South Dakota, Texas, Washington, and Wyoming.

Nominating petitions for all state delegates to be elected in 1978 must be filed with the Board of Elections at Association headquarters not later than January 17, 1978. All nominating petitions must be published in the March, 1978, issue of the *American Bar Association Journal*.

While it is desirable that more than the required minimum of twenty-five names of members of the Association appear on a nominating petition, only twenty-five names of signers of any petition will be published, as provided by Section 6.3(b) of the Association's Constitution. Only signatures of members of the Association will be counted. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition. The petition must be accompanied also by a seventy-five word biographical sketch of the nominee. Forms for this purpose will be provided. The biographical sketch will be included in the ballot material sent to each Association member in the state for which the nominee is a candidate for the office of state delegate.

A candidate for nominee and all signers must be members of the Association whose membership is accredited to the state where the election is being held. There is no limit to the number of candidates who may be nominated in any state, and the nominations are made only on the initiative of members themselves.

Each nominee for the office of state delegate is entitled to receive one list of the names and addresses of the Association members in his state. The list is to be made available only after the proper filing of a nominating petition upon written request.

Forms of nominating petitions may be obtained from the Board of Elections at the headquarters office of the American Bar Association, 1155 East Sixtieth Street, Chicago, Illinois 60637. Nominating petitions must be received at the headquarters of the Association before the close of business at 4:45 P.M. January 17, 1978. Ballots will be mailed to the members in good standing, accredited to the states in which elections are to be held, not later than March 15, 1978, so that they will be received by members at approximately the same time as the March issue of the *Journal* containing the nominating petitions of the various candidates.

Board of Elections
Robert O. Lukowsky, *Chairman*
William H. Avery
Livingston Hall

National College of District Attorneys

FOLLOWING is the 1977–78 schedule of the National College of District Attorneys:

November 13–16, San Francisco, "Law Office Management."
November 16–19, El Paso, "Trial of a Drug Case."
December 4–9, Columbus, Ohio, "Advanced Organized Crime."
January 15–20, Houston, "Prosecutor's Office Administrator Course."
January 29–February 1, San Diego, "Major Fraud."
February 12–15, Denver, "Pretrial Problems."
February 26–March 2, Indianapolis, "Organized Crime."
March 12–17, "Investigators School."
March 14–18, Los Angeles, "Trial Techniques."
April 9–12, Orlando, "Crimes against Persons."
April 23–28, Dallas, "Advanced Organized Crime."
May 21–26, Houston, "Prosecutor's Office Administrator Course."

Further information may be obtained from the Registrar, National College of District Attorneys, College of Law, University of Houston, Houston, Texas 77004 (telephone 713/749-1571).

National Institutes

FOLLOWING is the 1977–78 announced calendar of American Bar Association national institutes:

November 3–4, Washington, D.C. "Current Issues in the Regulation of Public Utilities" (Section of Public Utility Law).

November 9–10, Washington, D.C., "Current Legal Aspects of Doing Business in the European Economic Community" (Section of International Law).

November 10–11, Atlanta, "Equal Employment Opportunity Law" (Section of Labor Relations Law).

November 10–11, Atlanta, "Economics of Divorce" (Section of Family Law).

November 11–12, Atlanta, "Economics of Divorce" (Section of Family Law).

November 17–18, New Orleans, "Equal Employment Opportunity Law" (Section of Labor Law).

November 18–19, Atlanta, "Pornography" (Section of Criminal Justice).

November 19, Washington, D.C., "Debtor/Creditor Rights for the General Practitioner" (Section of General Practice).

December 2–3, Las Vegas, "Pornography" (Section of Criminal Justice).

December 9–10, New York City, "Business Records" (Section of Corporation, Banking, and Business Law).

December 16–17, New York City, "Pornography" (Section of Criminal Justice).

January 20–21, San Francisco, "Estate and Gift Tax Update" (Section of Real Property, Probate, and Trust Law).

January 21, San Francisco, "Debtor/Creditor Rights for the General Practitioner" (Section of General Practice).

January 25–26, Los Angeles, "Antitrust Grand Juries" (Section of Antitrust Law).

March 11, Dallas, "Debtor/Creditor Rights for the General Practitioner" (Section of General Practice).

March 14–15, Williamsburg, Virginia, "Trial of an Equal Employment Opportunity Case" (Section of Litigation).

April 18–19, Washington, D.C., "Law of International Human Rights" (Section of International Law).

April 27–28, Washington, D.C., "Labor Law in the Construction Industry" (Section of Labor Law).

May 18–19, Houston, "Environmental Law" (Section of Natural Resources Law).

May 25–26, San Diego, "Trial of an Equal Employment Opportunity Case" (Section of Litigation).

June 10, Chicago, "Debtor/Creditor Rights for the General Practitioner" (Section of General Practice).

Further information may be obtained from American Bar Association National Institutes, American Bar Association, 1155 East Sixtieth Street, Chicago, Illinois 60637 (telephone 312/947-3950).

A.L.I.–A.B.A. Curriculum

FOLLOWING is the 1977–78 announced curriculum of the joint Committee on Continuing Professional Education of the American Law Institute and the American Bar Association:

November 17–18, Kansas City, Missouri, "Tax and Business Planning for the Small But Growing Business."

November 18–19, Boston, "Eleventh New England Antitrust Conference" (cosponsored by Massachusetts Continuing Legal Education–New England Law Institute, Inc., and the Antitrust Committee of the Boston Bar Association).

December 1–3, San Francisco, "The Proposed Federal Bankruptcy Reform Act."

December 1–3, San Francisco, "Eminent Domain."

December 2–3, Washington, D.C., "Investment Companies: The Changing Role of Outside Directors."

December 8–10, New York City, "The Proposed Federal Bankruptcy Reform Act."

December 9–10, Washington, D.C., "E.R.I.S.A. and the Securities Laws" (cosponsored by the Securities Law Committee of the Federal Bar Association).

January 19–21, Phoenix, "Labor Law for the General Practitioner" (cosponsored by the State Bar of Arizona).

January 28–29, Scottsdale, Arizona, "A.B.A. Section of Taxation Annual Advanced Study Sessions: Estate and Income Tax Planning for Executives and Small Business Owners" (jointly presented by the A.B.A. Section of Taxation and A.L.I.–A.B.A.).

February 9–11, Washington, D.C., "Environmental Law" (cosponsored by the Environmental Law Institute and the Smithsonian Institution).

February 23–25, San Francisco, "Pension, Profit-Sharing, and Other Deferred Compensation Plans."

March 17–18, Atlanta, "Practice under the Federal Rules of Evidence: Recent Developments" (cosponsored by Emory University School of Law).

March 29–31, Chicago, "Legal Problems of Museum Administration" (cosponsored by the Smithsonian Institution with the co-operation of the American Association of Museums).

March 30–April 1, Washington, D.C., "Qualified Plans, Insurance, and Professional Corporations."

May 4–6, Denver, "Energy and the Law: Problems and Challenges of the Late Seventies."

May 11–13, New York City, "Eminent Domain."

May 12–13, Washington, D.C., "Construction Contracting in the Middle East: Problems and Solutions."

Further information may be obtained from Donald M. Maclay, Director, Courses of Study, A.L.I.–A.B.A. Joint Committee, 4025 Chestnut Street, Philadelphia, Pennsylvania 19104 (telephone 215/387-3000).

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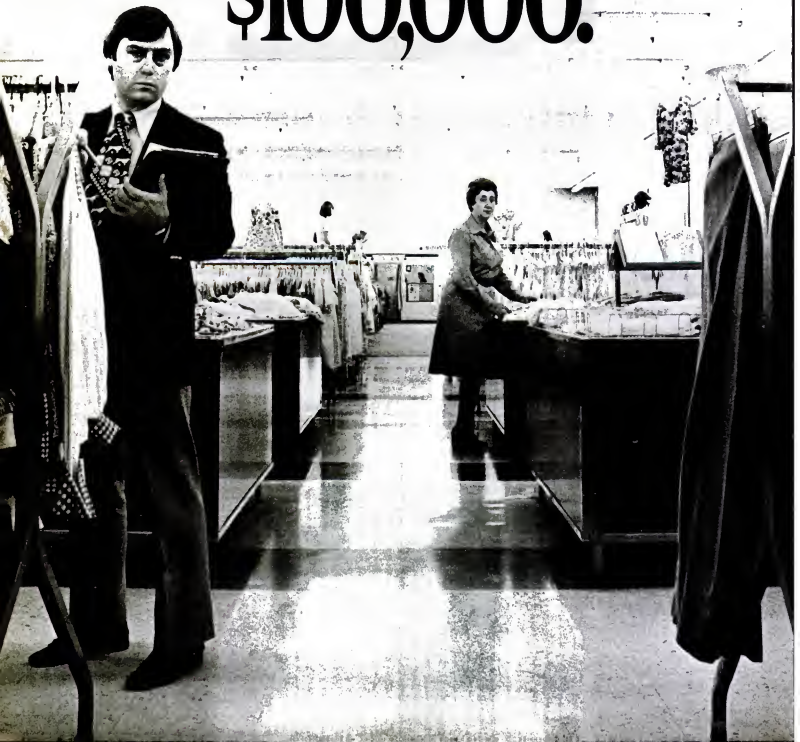

By William Cabell Wynne,* Attorney at Law.

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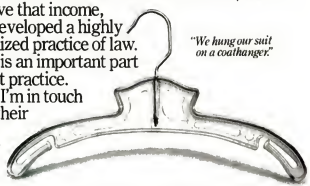

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October, 1977

Puberty, Privacy, and Protection:

The Risks of Children's "Rights"

Does the movement toward children's "rights" contain the seeds of destruction for the family?

By Bruce C. Hafen

THE GROWING concern with legal rights for children has precipitated a conflict between two of our most fundamental cultural traditions—family life and individual liberty. This conflict carries the potential of badly damaging both traditions.

Few themes have been more fully treated in legal literature than the tradition of individual liberty. The "family tradition," however, has been such an obvious presupposition of our culture that it has not been well articulated, let alone explained or justified. The absence of explicit mention of minority status or parental roles in the Constitution or early laws of the Republic may be among the most potent of the "great silences" in our jurisprudence.

Children have been excluded purposely from full participation in democratic life because the phil-

osophical fathers of individualism, as well as our law, have assumed that capacity is a prerequisite to the meaningful exercise of freedom.

The family tradition historically has enjoyed an important compatibility with the individual tradition because of the family's leading role in preparing children for the responsibility of majority status by helping children to develop mature capacities.

But with the passion and the power of the civil rights movement, spurred on by other recent celebrations of egalitarianism, one now sees the two traditions of individualism and family life on a collision course. Now there are those who would "liberate" children from the "captivity" of the family tradition: "I propose that we consider the logical and ultimate step—that all legal distinctions between children and adults be abolished," wrote James H. Manahan in the spring, 1976, newsletter of the Section of Individual Rights and Responsibilities of the American Bar Association.

And so it becomes necessary to begin articulating some of the assumptions so implicit in the relative silence of our jurisprudence on the relationships among childhood, family life, and individual liberty to make more explicit what is for most people a continuing and collective value judgment of ancient origins.

The urgent need for this was made evident by the majority opinion of Justice Blackmun in *Planned Parenthood* v. *Danforth*, 428 U.S. 52 (1976), a five-four decision striking down a state statute requiring parental consent to an abortion for an unmarried minor except when the abortion is necessary to preserve the life of the pregnant minor. The opinions of the two concurring justices and action taken in a companion case dealing with different statutory language (*Bellotti* v. *Baird*, 428 U.S. 132 (1976)) seem to suggest that parental consent requirements might be constitutionally permissible if allowance were made for certain contingencies not anticipated by the restrictive provisions of the Missouri statute at issue in *Planned Parenthood*. Although it is unclear precisely what those contingencies are, it seems there should at least be some protection required in situations in which parents cannot be located or when a therapeutic abortion is necessary for reasons that fall short of a threat to the mother's life—circumstances not clearly anticipated by the Missouri statute.

The Blackmun opinion, however, intimates that for some "competent" minors there may be a constitutional right of privacy that, if applied broadly, would limit parental intervention into abortion (and perhaps

other decisions as a matter of a child's lifestyle preference alone. That possibility, although stated ambiguously in an opinion unqualifiedly joined by only two other justices, deserves careful consideration because of its potential implications. Citing the progeny of *In re Gault*, 387 U.S. 1 (1967), in which certain procedural due process protections were first acknowledged for minors, Justice Blackmun states, "Minors, as well as adults, are protected by the Constitution and possess constitutional rights." He acknowledges that "the state has somewhat broader authority to regulate the activities of children than of adults," refers briefly to the role of parental authority, but concludes, "Any independent interest the parent may have in the termination of the minor daughter's pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant." He then emphasizes that "our holding . . . does not suggest that every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy."

The opinion says nothing about its possibly drastic impact on the concept of minority status. Rather than exploring the traditional tests for overcoming the limitations of minority status—changes in the minimum age, early emancipation, or existing exceptions to common law parental consent requirements—Justice Blackmun alludes to "competency" as the key factor. He offers no criteria for determining or measuring it. He seems to introduce a new subjective test for what is, in substance, a determination of majority status.

It does not appear that the Blackmun language speaks for the Court, since Justices Stewart and Powell entered a concurring opinion that was necessary to establish the majority result in the case. That Stewart and Powell would be the justices to concur is significant, since in prior cases they have shown more sensitivity to the implications of the Court's previous children's rights decisions than other members of the Court. (Hafen, "Children's Liberation and the New Egalitarianism," 1976 *Brigham Young University Law Review* 605, 635–36.)

Blackmun's Opinion Raises Serious Questions

The Blackmun opinion, perhaps unintentionally, raises serious questions about the assumptions underlying the entire concept of minority status. The beginning premise of all juvenile and minority status law in this country has been that persons below the age of majority should be subject to the controlling authority of either their parents or the state. The consent of either a natural parent or the state acting as a parent has always been a prerequisite to serious medical treatment for minors, except in emergencies. The state has had no authority to intervene in those cases unless there was no parent competent to act. When parental conduct or refusal by parents to act has posed a serious threat to the health or well-being of a child, statutes proscribing abuse or neglect have justified state intervention. This basic position has flowed from the commitment of both statutory and common law to a policy of protecting minors, both from the actions of others and from their own improvident decisions.

It is important to note that the *Gault* line of cases is entirely consistent with the protection policy. In none of those cases did the Court call into play the power of "adult" constitutional protections because of any new assumptions about increased capacities of minors to determine their own choices or because of any intention to abandon the tradition of minority status. *Gault* simply made it clear that there is nothing about juvenile or minority status (a general concept approved by *Gault*) that justifies a juvenile court's failure to provide the most basic protective safeguards inherent in procedural due process. The limited capacities of minors make it imperative to provide them with special legal protection, whether constitutionally mandated or not.

A key concept underlying the policies of protection and minority status that has not been widely articulated, perhaps because it has seemed so historically obvious, is the notion that parents stand in a position of authority and responsibility between the state and children. A family has been treated somewhat as a legal entity, with parents having responsibility for the entity. The state has had very limited access to minors within families headed by legally competent parents. Short of *in loco parentis* circumstances, parents have been thought to have not only the constitutionally sanctioned right but also the heavy responsibility to protect, educate, and influence the values of their children, in addition to providing physical and economic care.

The Blackmun "egalitarian" position, carried to its logical conclusion of extending "fundamental" rights to children, carries serious implications for this basic social assumption.

First, its reasoning reverses the crucial legal assumptions about the limited capacities of minors inherent in existing limitations on their liberties, which provide that many significant legally binding choices (voting, marrying, contracting, for instance) may not be made until a certain age. The reversal of this basic assumption results from the application to minors of the constitutional test applied in most fundamental rights cases—that the state may not interfere with the individual right in question unless it can show a "compelling state interest." When applied to children's rights, this test necessarily implies that, absent a compelling state interest to the contrary, majority capacity must be presumed. It may be noted that voting and marrying have been established, along with the right of privacy, as fundamental rights. That a significant state interest is necessary to limit the privacy rights of minors was made explicit in *Carey v. Population Services*.

There would be more than administrative incon-

venience in assuming that all children are capable of exercising fundamental rights until empirically shown otherwise. The ability of the social sciences to "prove" something as subjective as individual "capacity" is sufficiently questionable that *the placing of the legal presumption will govern the outcome in most cases.* But, because children obviously move from incapacity toward capacity, there is no realistic alternative to the present practice of beginning with assumed incapacity until objective age standards are met.

Second, the uncritical application of egalitarian theory to children places them and their parents on the same plane in their relationship to the state. This apparently subtle shift has the enormous effect of removing parents from a "line position" between the state and their children, which not only exposes families to the risks of direct state access to children, but which raises basic new questions about the nature of parental responsibility. It would be arguable under a full-blown children's liberation theory that the law should begin with the premise that the state has the same relationship with children as adults. Thus, during periods when children are obviously dependent, the state would be entitled to assume direct responsibility for child rearing. It may even be obliged to do so, subject to its ability to find parents or other adults willing to assume delegated authority from the state to act as parents. The economic and social implications of this theory would not be very subtle. For one thing, the state could revoke or limit its delegation, and in no case could "parents" exercise greater authority than could the state.

An illustration of the egalitarian approach to children's rights may be found in a 1975 decision of the Washington Supreme Court upholding a juvenile court decision granting the request of a fifteen-year-old girl who sought, in effect, a "divorce" from her parents on the grounds of "incompatibility." *In re Snyder,* 532

P. 2d 278. The actual legal theory of that case involved a self-initiated request by the girl that she be declared "incorrigible" and placed in a foster home with guardians having views closer to her own, although she had done nothing to show substantive incorrigibility other than threaten to run away from home if her request were not granted. Her parents previously had been found legally fit in a hearing before the same court.

Counsel for the girl acknowledged in their brief that, although they had found no applicable case law, they believed that *In re Gault* suggested that "children are autonomous individuals, entitled to the same rights and privileges before the law as adults." The girl was described as "a bright, able, and resolute young woman who . . . has apparently made a decision about her life." Evidently her "decision" was that she preferred not to be subject to the authority of her parents, although the exercise of that parental authority had been legally evaluated and declared nonabusive and nonneglectful.

Justice Frankfurter once wrote, "Children have a very special place in life which law should reflect. Legal theories and their phrasing in other cases readily lead to fallacious reasoning if uncritically transferred to determination of a state's duty toward children." *May* v. *Anderson*, 345 U.S. 528, 536 (1953) (concurring opinion). By examining the legal rights of children solely within the framework of individualistic constitutional theories growing out of the civil rights movement, American lawyers and judges already have begun to commit the error warned against by Frankfurter. It is as though our commitment to nondiscrimination has become indiscriminate.

Kids Are People Too

Some forms of discrimination are wise and appropriate, precisely because they lead ultimately to greater individual liberty for those temporarily subject to the discrimination. There is no better illustration of this truth than the way in which a preparatory and protective period of minority within the walls of family life provides the essential educational opportunity that is prerequisite to meaningful participation in a democratic society. It would be an irony of tragic proportions if, in our egalitarian zeal, we abandoned our children to their "rights" in a way that seriously undermined their claim to protection and developmental opportunity.

Legal rights need not take the form of specific constitutional protections in order to exist meaningfully. The rights and interests of children have been carefully weighed and protected for a long time in the context of family and juvenile law, in which the "right" of children to adequate parental care has been a guiding objective as significant as if it were a constitutional phrase. A strong preference for parental custody and the strengthening of family ties often has been stated as a fundamental legislative purpose in juvenile court statutes. How strange for a legal tradition committed to experience as its lifeblood that the incantation of "constitutional rights" would imply to able judges that our society has just now discovered that "kids are people too."

Bruce C. Hafen is a professor of law at the J. Reuben Clark Law School of Brigham Young University. He was educated at B.Y.U. and the University of Utah (J.D. 1967).

Perhaps this tendency results from our intangible but understandable feeling that the principal moral movement of our time is that for human rights. However, the greatest impediments to the success of that movement, as with many movements having enough momentum to produce genuine zeal, will likely flow from its own excesses. Our commitment to family life is also a fountainhead of moral momentum, although we are a bit tardy in thinking through the reasons why that may be so.

Some clarifying distinctions might help ensure the future compatibility of the family tradition and the individual tradition.

First, the constitutional principles arguably applicable to children can be categorized into rights of "protection" and rights of "choice." Protection rights include the right not to be imprisoned without due process, rights to property, and rights to physical protection. No minimal intellectual or other capacity is necessary to justify a claim to those rights. The legal doctrines developed for the benefit of children throughout the history of our jurisprudence (including *Gault*) are primarily in this category.

"Choice" rights, on the other hand, are the legal authority to make affirmative binding decisions of lasting consequence—marrying, contracting, exercising religious preferences, or seeking education. A classic example of a choice right is the right to vote, which may be the most fundamental of citizenship rights, yet it has always been subject to an age limitation. Prior to Justice Blackmun's 1976 opinion in *Planned Parenthood*, the Supreme Court had not invoked a constitutional doctrine (such as the right of privacy) in a children's rights case that establishes a true choice right in the sense described above.

An important relationship exists between the protection-choice distinction and the concept of minority status. The denial of choice rights during minority is a form of protection against a minor's own immaturity and his vulnerability to exploitation by those having no responsibility for his welfare. The conferring of the full range of the choice rights—

essentially, adult legal status—requires a dissolution of the protection rights of childhood. One cannot have the freedom to live where and as one chooses and still demand parental support; one may not deliberately enter into contracts and yet insist that they be voidable. The lifelong effects of binding, childish choices can cause permanent damage far more detrimental than the temporary limitations on personal freedom inherent in minority status. To be protected against that risk requires a restriction on the range of choice rights.

A second major distinction must be drawn between the role of parents and the role of the state. One of Justice Blackmun's concerns about state statutes requiring parental consent for minors' abortions dealt with what he considered a delegation of authority by the state to parents in a way that permitted parents to restrict their children in ways the state could not. This point of view seems to ignore the fundamental principle that in the United States the state possesses only the authority given it by citizens—not vice versa. The state does not need to grant parents authority they already have and which is, under our political theory, prior to the state itself. It is likely that parents have far more authority over their children than they would ever collectively and voluntarily delegate to the state. There is no necessary congruence between parental authority and state authority over children who have legally competent parents.

Parental Authority Is Most Private

Justice Blackmun's view reflects a surprising insensitivity to the distinction between public and private action generally and to the private authority of parents in particular. It also seems to assume that state support for parental authority falls automatically into the category of "state action" for Fourteenth Amendment purposes. Few actions could be more private than the exercise of parental authority. While many state intrusions into normal family life would invade the most basic forms of privacy, there is little that goes on between parents and children that would not amount to reciprocal invasions of privacy were it not done within the intimacy of a family home. Respect and even firm support by the state for natural and existing parental authority is hardly the same as a delegation of authority by the state to some third party such as a physician or social worker to take action the state could not appropriately take in an official way.

An additional distinction of great significance between the positions of the state and parents is the role of each in the inculcation of values in children. Under pure egalitarian theory, few propositions are more reprehensible than those authorizing some to control or even to influence significantly the value choices of others. With its commitment to pluralistic value options within certain ultimate limits, our society has always had a special and justifiable fear of governmental control over access to and decision making within the free marketplace of opinion. However, that same commitment has always prized the right and the social duty of parents to raise and educate their own children according to the personal philosophical or other preferences of the parents, so long as parental action in this context falls short of serious harm. Under our system the obligation for socializing the young does not lie with the state, which may delegate its duty to parents. Rather, the primary obligation is with parents, who may delegate *their* authority to schools and other state agents.

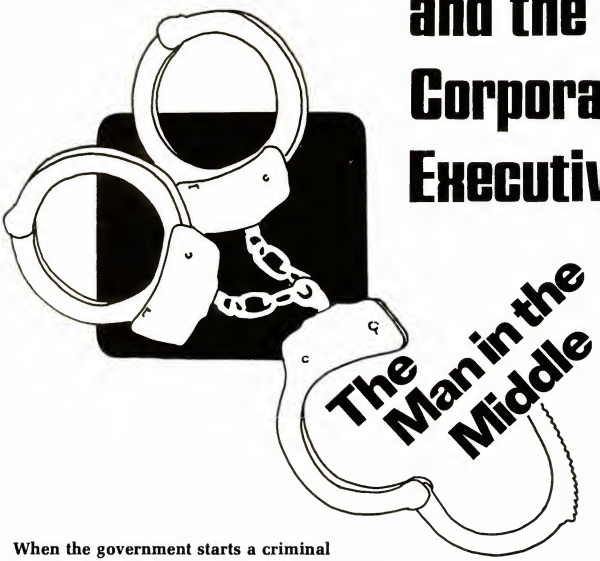
On a subject as value laden as abortion, a parent's view of the child's decision is likely to be influenced by the parent's personal philosophy more than by any other factor—unless the abortion is necessary for therapeutic reasons. The right of privacy for abortions on adults recognized in *Roe* v. *Wade*, 410 U.S. 43 (1973), provides a clear example of the notion that the government should remain as neutral as possible on these personal issues. But if our fear of state control or influence also extends to the parents of minor children, serious doubt is cast on the primary role for value transmission ascribed by our culture to parents.

Supervision of the choice rights of minors is at the very heart of the custodial rights of parenthood, as well as being the rationale for minority status. Removal of that supervision from parents begins to resemble a fundamental change in our present assumption that we would not tolerate from government what we fully expect from parents.

Policies that restrict parental prerogatives are likely to create noncommittal parental attitudes, either because parents will believe they have no right to give direction to their children or because they fear that in giving them direction they might meet some kind of state-supported resistance. For most parents the "rights" of parenthood leave them no alternative but an assumption of parental responsibility, because that responsibility, both by nature and by law, can be assumed by no one else until the parent has failed. To undermine parental initiative is unwise, because we have no alternative to it—other than a pervasive state assumption of child-rearing duties. It might even be argued that our children have a *right* to the protection of state policies that encourage parental responsibility.

The Supreme Court has not clearly established that the constitutional rights of minors (particularly "choice rights") are all coextensive with those of adults. Lower court judges and child advocates who are swept along by the forceful winds of the current equal rights movement are simply not justified in assuming otherwise. And before judges and advocates do undertake a dismantling of our assumptions about the purpose of family life and minority status, let the profession at least become articulate about the risks inherent in that dismantling, for those risks extend not only to adults but, perhaps most poignantly, to the long-range welfare of our children. ▲

Criminal Antitrust and the Corporate Executive:



The Man in the Middle

When the government starts a criminal antitrust investigation, the corporate executive is the man in the middle. Both need separate counsel.

By Howard E. O'Leary, Jr.

THERE HAS LONG been a conflict between the interests of a corporation and its individual executives when it—and they—are subjects of a criminal antitrust investigation. The corporation is interested in minimizing its exposure to subsequent civil treble damage liability. The individual executive does not want to be fined or go to jail but also wants to preserve his corporate career, both within the company and the industry.

It used to be in the interests of both the corporation and the executive to dispose of an indictment alleging an antitrust offense by entering a plea of *nolo contendere*. The plea acted as a shield for the corporate defendant in a subsequent private treble damage suit to the extent that it could not be used as *prima facie* evidence of liability. The corporate defendant faced a possible $50,000 fine, but for most corporations that

was a relatively light penalty. In addition to the maximum fine, the corporate executive faced the possibility of a year in prison, but jail sentences rarely were imposed.

Two new statutes have changed that picture dramatically. The Antitrust Procedures and Penalties Act of 1974 increased the maximum term of imprisonment for a Sherman Act violation to a three-year felony. In addition, the individual defendant also faces a maximum fine of $100,000 instead of $50,000. For the corporate defendant, the maximum fine was increased from $50,000 to $1 million.

The Antitrust Improvements Act of 1976 increased the exposure of corporations to treble damage liability in price-fixing cases. Title III of that act allows state attorneys general to bring a *parens patriae* action for treble damages on behalf of consumers who have been injured as a result of a violation of the Sherman Act, without the necessity of the state's having been injured in its own business or property. Section 4F of Title III specifically authorizes the aggregation of damages when there has been a determination that a defendant agreed to fix prices in violation of the Sherman Act.

There are two unmistakable trends in criminal antitrust enforcement. First, more individual defendants are indicted along with their corporate employers. Second, an ever-increasing number of individuals are being sent to jail. This trend will increase as more individuals are indicted and convicted under the new felony provisions of the Sherman Act.

While a plea of *nolo contendere* under the new felony provisions will continue to have obvious advantages for the corporate defendant, it offers little or no consolation to the individual. Under the Federal Rules of Criminal Procedure, there is no difference in the consequences of a plea of *nolo contendere* as opposed to a plea of guilty insofar as punishment is concerned. The Department of Justice's sentencing recommendation will not be affected by the fact that an individual enters and a court accepts a plea of *nolo contendere*.

Price Fixing Warrants Stiff Sentence

In September of 1976 Donald I. Baker, then assistant attorney general in charge of the Antitrust Division, indicated that the government would recommend a base sentence of eighteen months for individuals convicted of price fixing. The base sentence recommendation would be increased or decreased depending on the presence or absence of six aggravating and two mitigating factors. Faced with the possibility of going to jail, more individuals can be expected to sacrifice the interests of the corporation and save themselves.

Under Disciplinary Rule 5-105(C) of the American Bar Association Code of Professional Responsibility, the same attorney or law firm may represent two clients with actual or potentially conflicting interests if the two clients have knowledge of the dual representation, give their consent to the representation, and if the attorney or firm is able to "exercise independent professional judgment on behalf of each." Obviously, there is at least a potential conflict when corporate executives are called to testify before a grand jury conducting an antitrust investigation.

It is difficult to see how the same attorney or firm can exercise independent professional judgment on behalf of both a corporation and an individual who is a target of a grand jury investigation. In an era when treble damage claims far exceed the maximum criminal penalties for corporations, the lawyer's primary responsibility is to limit the company's exposure to liability. The same counsel can hardly advise an individual executive to implicate the company and his superiors rather than risk indictment and a jail term.

Counsel Should Try to Obtain Immunity

There is an actual conflict between the same counsel or firm's representing the corporation and its executives when both are guilty of the offense under investigation (unless the interests are identical—for example, a sole proprietorship). When the individual receives a grand jury subpoena, counsel should explore the possibility of obtaining immunity. Under the Organized Crime Control Act of 1970, no testimony or other information compelled under a grant of immunity may be used against the witness in any subsequent criminal case except a prosecution for perjury, false statement, or contempt. Immunity is extended only to the use of the compelled testimony or to information derived from this testimony.

Generally, once immunity is granted to a witness, it is difficult for the government to prosecute that individual later for offenses described in his testimony. The government has the affirmative "substantial" burden of proving that its evidence is untainted and has emanated from sources fully independent of the compelled testimony. The Antitrust Division has not granted immunity to an individual before the grand jury and thereafter prosecuted him for the same offense since the passage of the Organized Crime Control Act in 1970.

In the old days counsel knew that when an individual received his grand jury subpoena, was sworn and testified, he would get immunity automatically with respect to his personal involvement in any offense. Today the Antitrust Division wants some assurance that an individual's testimony will be of value before a grant of immunity is sought. The same lawyer cannot bargain on behalf of an employee for immunity by promising to deliver evidence that will incriminate his corporate client. Yet that is precisely what the lawyer for the individual should be doing in the early stages of a grand jury investigation when his client is involved. Practically speaking, the Justice Department will need the testimony of some individuals in order to make the case. By the same token, it is clear that not all of the individuals involved will receive immunity. The

executive who chooses to be represented by corporate counsel during the grand jury investigation may well end up being a defendant instead of an unindicted coconspirator.

If the government decides to grant immunity, then the employee clearly needs individual representation. The division won't authorize a grant unless it believes that the individual's testimony is important to the investigation. Once immunity is granted, it is important that the witness co-operate fully, however damaging that may be to the corporation. The Department of Justice has a strong interest in maintaining the integrity of grand jury investigations. A failure to recall significant events may result in a motion for an order to show cause as to why the witness should not be held in contempt. Witnesses also have been prosecuted successfully for perjury after a grant of immunity. When an individual is in the grand jury room, he needs a lawyer close at hand whose loyalty is undivided.

The grand jury usually will have subpoenaed and reviewed a large number of corporate documents before individuals are called to testify. Even if the documents so incriminate a particular executive that the government would not authorize a grant of immunity under any circumstances, the Code of Professional Responsibility would still require individual representation for that executive. Even if the executive is a major figure in the price-fixing conspiracy and the government has him "cold," the executive and his counsel should consider the possibility of offering a plea of *nolo contendere* or guilty and testimony on behalf of the prosecution at the trial, in return for a recommendation by the government for a suspended sentence. The most important mitigating factor to Mr. Baker in recommending a sentence was co-operation with the government.

Guilty Plea Topples Dominoes

If an indictment is returned and a major figure quickly pleads guilty or *nolo contendere*, the other defendants must assume that he will be a witness for the government. This may induce the remaining defendants to plead guilty or *nolo* and thus save the government the time and expense of a trial and appeals. It goes without saying that the same lawyer cannot make that kind of independent professional judgment on behalf of an individual and still represent the corporation.

In other instances, there is at least a potential conflict. When a grand jury is convened to conduct a criminal investigation and the corporation receives a *subpoena duces tecum* or otherwise learns of the investigation, the corporate legal department and outside counsel generally don't know whether an offense has been committed, whether it can be proved, or who in the company may be involved. They conduct their own inquiry to ascertain the facts and determine the position their client should take in the investigation. This will involve an exhaustive review of the documents, interviews with employees, consultation with the attorneys for other subjects of the investigation and with Antitrust Division officials.

Howard E. O'Leary, Jr., now practices law in Washington after serving seven years as chief counsel and staff director of the Senate Subcommittee on Antitrust and Monopoly. Prior to that he was an assistant United States attorney in Michigan. He is a graduate of the University of Michigan (B.A. 1960, J.D. 1963).

Cashen/Stout

Even after this process has been completed, corporate counsel is rarely afforded the luxury of knowing precisely what information the government has and the inferences the grand jury will draw from it. When employees receive subpoenas from the grand jury, the corporation's interest is most often best served by having them assert their Fifth Amendment privilege. If there is the slightest chance that the corporation may be indicted, why do anything that might assist the government in its investigation? This course of action, however, may involve risks for employees who are marginally involved or entirely innocent of any wrongdoing but do have information relevant to the investigation.

At the time corporation counsel advises an employee whether or not to testify before the grand jury without immunity, counsel must assume that a transcript of the employee's testimony will become available to private treble damage plaintiffs if civil suits are filed. In addition, corporate counsel cannot ignore the possibility that under the new Federal Rules of Evidence the grand jury testimony may one day be used against the corporation during a trial as affirmative evidence.

Under existing law a private plaintiff in a treble damage antitrust action may be permitted access to grand jury testimony and documentary material on a showing of particularized and compelling need.

District courts generally weigh the policy considerations underlying grand jury secrecy against the request for disclosure to determine if those considerations are applicable, and they are increasingly finding that the policy reasons for grand jury secrecy are not applicable when private treble damage plaintiffs are seeking access to grand jury testimony or documentary materials.

The trend in recent court decisions is clearly in favor of more liberal disclosure of grand jury testimony and documentary materials to private plaintiffs who have filed subsequent treble damage antitrust actions.

Another factor that may affect the advice given to individuals on appearing before the grand jury without immunity is the possible use of this testimony during a trial as affirmative, substantive evidence. Before the

enactment of the new Federal Rules of Evidence, grand jury testimony could only be used during a trial to refresh the witness's recollection or to impeach credibility. When the witness was called by the government or the plaintiff, it was even difficult to use this testimony for impeachment purposes. Courts often required a showing of "surprise" before declaring the witness hostile and permitting impeachment. Even in that situation, the earlier testimony was of no value in getting the prosecution or plaintiff past a motion for judgment of acquittal or directed verdict.

All this has been changed by the new Federal Rules of Evidence. Rule 607 provides that "the credibility of any witness may be attacked by any party, including the party calling him." But the more important provision is Rule 801(d): "A statement is not hearsay if . . . the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . inconsistent with his testimony." Thus, prior inconsistent grand jury testimony is substantive evidence, which may enable the government or a private plaintiff to have its case considered by the trial jury.

It is difficult to believe that corporate counsel will not be influenced by these factors when advising an employee to assert the Fifth Amendment privilege before the grand jury, as opposed to testifying voluntarily. In that situation the employee who has nothing to hide may receive less than candid advice.

Trial May Be the Best Bet

Once an indictment has been returned, multiple representation of both the individual and the corporation is not appropriate. Given the consequences of a felony conviction and the very real possibility of a jail sentence, the corporate executive no longer has the incentive that previously existed to dispose of an indictment by a plea of *nolo contendere*. The employee must assume that this plea will ruin his career within the company and may cost him his job. Corporations will not want it to appear that they are condoning felonious conduct by their employees. The severe civil consequences of pleading guilty or *nolo contendere* to a felony cannot be ignored. In many states, the right to vote, to hold public office, and to hold professional licenses are forfeited on conviction. Under these circumstances, more individuals may wish to take their chances and go to trial.

The corporation, on the other hand, may be less than enthusiastic about its employees' exercising their rights to put the prosecution to its proofs. First and foremost, it may fear the prima facie effect of Section 5(a) of the Clayton Act in subsequent private treble damage liability if it proceeds to trial and is convicted. Second, in the past the Antitrust Division has followed a policy of recommending against the acceptance of *nolo* pleas, unless all of the defendants in an indictment were prepared to plead that way. Unless this policy is changed, an individual defendant could be in the position of forcing the corporation to go to trial and defend itself. Even if there are exceptions to this policy and the corporation permitted to enter a *nolo* plea, it will not relish the prospect of having the evidence against its employees spread on the public record at trial. If the corporation decides to go the *nolo* route, obviously its interests are best served if all of the individuals do likewise. The postindictment interests of the individual and the corporation are clearly different.

Multiple representation after indictment does not seem appropriate, even in those situations in which counsel believes that both the corporation and the individual are entirely innocent of any wrongdoing. Despite the trend toward more liberal discovery under the Federal Rules of Criminal Procedure, it is impossible to anticipate what may occur at trial. Evidence may be admitted during the trial against the corporation that would be prejudicial to the individual defendant when the same attorney represents both.

The Code of Professional Responsibility clearly states that a lawyer should resolve all doubts against joint representation if there is a possibility that his judgment may be impaired or his loyalty divided. Ethical Consideration 5-15 goes on to state: "A lawyer should never represent in litigation multiple clients with differing interests; and there are few situations in which he would be justified in representing in litigation multiple clients with potentially differing interests. If a lawyer accepted such employment and the interests did become actually differing, he would have to withdraw from employment with likelihood of resulting hardship on the clients. . . ."

There also are advantages to the corporation if the employees in a criminal investigation have independent counsel. Individual representation avoids the appearance of impropriety and enhances the credibility of the corporation, both in the eyes of its shareholders and the public. The Code of Professional Responsibility makes it clear that the lawyer employed or retained by the corporation owes his allegiance to the entity and not to a director, officer, employee, or shareholder. But the distinction between allegiance to the corporation and the incumbent management is easily blurred, especially to the public.

In recent speeches Antitrust Division officials have warned that representation of both a corporation and its employees by the same attorneys continues to be a problem. The determination as to when the problem arises should be made by the defense bar. The following rule of thumb seems appropriate: Whenever there is reason to believe that an employee may be indicted, multiple representation should be refused and the individual directed to retain his own attorney. If the defense bar fails to meet its responsibility in this area, then the Justice Department should adopt a policy of filing motions for disqualification when it believes there is a conflict. ▲

Come Home, Temple Bar

The famous gateway to Legal London will be restored—this time near Saint Paul's—as a result of a campaign now under way in Britain and the United States.

By Mary Uphaus

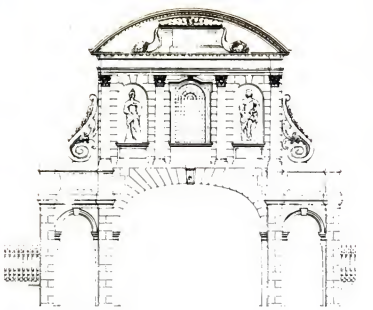
WHEN THE Temple Bar Trust for the restoration of the ornate seventeenth century gateway to Legal London was organized early in 1977 (62 A.B.A.J. 1595 (1976)) one writer to the *Times* of London enquired whether the spikes over the entrance, which were once used to exhibit the heads and private parts of executed seditionists, were to be replaced. The correspondent had a list of candidates he wanted to see displayed "high over roaring Temple Bar," as in days of old. The vindictive letter writer was informed that the spikes, removed at the beginning of the nineteenth century and not used after 1772, were not to be part of the restored Temple Bar.

From 1672 until 1879 Temple Bar, presumably an early work of Sir Christopher Wren, marked the western boundary of the City—the point at which the city of London ended and the royal city of Westminster began—where the City's Fleet Street now becomes Westminster Strand.

If Temple Bar was actually the work of Sir Christopher Wren (scholars disagree), it was one of his earliest public commissions. Saint Paul's Cathedral was his last. Whether or not Wren was actually the architect of Temple Bar, the stylistic compatibility of the two structures is unmistakable.

By the mid-nineteenth century Temple Bar had become a hindrance to traffic, and there were periodic outcries that it be torn down. And in the winter of 1878–79 it was. The carefully numbered stones lay in a builder's yard for the next ten years until a wealthy young brewer, Sir Henry Bruce Meux, rescued the remains and had them reconstructed at his estate, Theobald's Park, then in rural Hertfordshire. It can be seen there today but in a truly pitiable state. Covered with graffiti, it has been so damaged by time and weather that it is in real danger of falling down.

At the time of its first restoration the edifice was kept in mint condition—stones clean and smooth, glass and effigies intact, all approaches carefully tended with the loving professional care the very rich give their possessions. The actual money for the restoration came from Lady Meux, "the prettiest and richest of Temple Bar-Maids," the former Valerie Susie Langdon, who in fact



had been a barmaid at the Horseshoe Tavern in Tottenham Court Road.

When Temple Bar's second restoration is completed in early 1979, it is expected that Queen Elizabeth will preside at the dedication. All who participate in the fund raising will be invited to the ceremonies. The involvement of American lawyers in the campaign is generating enormous good will, not only from the legal profession, but from the British public as well. In part this feeling can be traced to the lack of fear that Temple Bar will be transported to the United States as a tourist attraction, as were London Bridge and the *Queen Mary*.

The movement to save Temple Bar is the project of T. Tyndale Daniell, a young barrister of Gray's Inn, who has described his involvement as "involuntary . . . like falling in love."

Lawyers who love the law will empathize with Mr. Daniell's feeling that Temple Bar should be restored, for the ancient gateway has historic as well as architectural significance, and to lawyers of the English-speaking countries it is of particular importance. Temple Bar is an international symbol of the common law, the foundation stone of law in the English-speaking countries whose principles were brought to the colonies by English settlers. The restoration of Temple Bar will take approximately eighteen months and will cost about one million dollars.

When Temple Bar is dedicated much credit will be because of the efforts of American lawyers, notably Charles A. Bane of Chicago, chairman of the American Foundation for Temple Bar. Mr. Bane's English counterpart is Sir Hugh Wonter, a former lord mayor of London.

In January of 1978, one hundred years after its removal, Temple Bar will be dismantled again. A team of workmen, stonemasons, architects, and carpenters will number the stones, take down the statues and detail work, and reassemble the restored parts at a new home, about six hundred yards from the original site, in Chapter Court, part of and astride the passageway that runs along the northern wall of Saint Paul's Cathedral. The actual work of restoration is to take about a year. The gateway will be free standing between the cathedral and Bancroft House in line with, but well recessed behind, the cathedral portico.

In addition to the opportunity to participate in a historic event, American contributors to the Temple Bar Fund may take a tax deduction—an advantage not enjoyed by British citizens. Lawyer fund raisers may be extended honorary affiliation in the Inns of Court, and businessmen may become honorary members of the British Institute of Directors.

This fall a campaign is under way in the United States. Its goal is half of the $1 million needed to restore Temple Bar. Inquiries and contributions may be directed to the American Foundation for Temple Bar, Suite 4200, One First National Plaza, Chicago, Illinois 60670.

Photo from *Equal Justice Under Law*. Courtesy Foundation of the Federal Bar Association

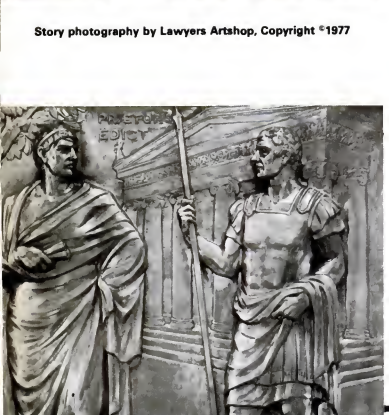
The Supreme Court's Bronze Doors

By David Mason

> This building attests confidence. It suggests permanence . . . not the permanence of stone and steel, but of an idea; not, in this respect, of particular formulas, but of a conception of the basic needs and achievements of our organized society.

SO STATED Chief Justice Charles Evans Hughes at the cornerstone laying ceremony at the United States Supreme Court Building on October 13, 1932, during the annual meeting of the American Bar Association.

1. Shield of Achilles. An intense rendering of the trial scene from the Shield of Achilles, as described in the *Illiad,* the most famous representation of primitive law, signifying the original basis of law and custom. Two wise men are shown debating a point while two gold pieces, which will constitute a prize for the man who propounds the best logic and "straightest judgment," rest on a stone altar between them.



Present were Cass Gilbert, the building's architect, along with the time's pre-eminent "stone carvers and architectural sculptors"—John Donnelly, an Irish immigrant, and his son, John, Jr. On these three individuals rested the responsibility of transferring the chief justice's prediction into reality.

One of the most striking examples of their total realization of Hughes's statement and one of the best pieces of "monumental legal art" anywhere in the world is the building's fully sculptured bronze entrance doors, sometimes referred to as the "Donnelly Doors" because of John Donnelly, Jr.'s, signature clearly visible in the lower outside corner of the right-hand door. "Out of all of our monumental projects, spread over two lifetimes, the Supreme Court doors are the only work that we ever signed—that's how important they were," John Donnelly, Jr., once said.

Seventeen feet in height, they are fully visible only during nonbusiness hours as they must be left open during the day to accommodate the steady flow of visitors to the building. During the day the right leaf of the doors is slid inside the building's marble walls. The left leaf is left partly exposed to allow visitors to see a part of the door's magnificence. After hours and on weekends and holidays, they are completely closed, beautifully illuminated, and can be fully seen and enjoyed either up close or from as far away as the Capitol, a block to the west.

The doors contain eight panels, each sculptured in high relief, that depict the great events in the development of the law and society's achievement of equality under it. The full message and story of the panels constitute a unique asset and inspiration for all lawyers and fulfill Chief Justice Hughes's prediction.

In 1929 William Howard Taft, the former president who was then chief justice, persuaded Congress to

2. Praetor's Edict. A Roman praetor (an ancient Roman magistrate ranking below a counsel and having chiefly judicial functions) successfully announces ("publishes") his edict proclaiming the enforceability of judge-made (common) law in Rome, thus establishing for the first time courts and *stare decisis,* while a Roman soldier, representing the force of government, watches in agreement and support.

3. Scholar Julian. Julian, said to be the first law teacher, instructs and consults with one of his pupils, who is apparently already involved in legal matters, thus indicating a development of the law by the interaction of scholars and advocates.

create and fund the United States Supreme Court Building Commission, which had the sole purpose of creating a permanent "home" for the Court. David Lynn, architect of the capitol, was executive officer of the commission, taking care of most of the detail work of the project, and Chief Justice Taft, and after him Chief Justice Hughes, was chairman of the commission, taking charge of the broad policy decisions about the building. Architect Cass Gilbert, who emphasized classical architecture and who had earlier worked on the state capitols of Minnesota, Arkansas, and West Virginia as well as many major public libraries and other public buildings, was selected to create the new Court building. For him it was the pinnacle of his architectural career and the last building on which he would work.

Early in the design process he had John Donnelly (who did business as John Donnelly, Inc.), a stone carver and modeler with whom he had worked on many other projects, prepare a plaster model of the entire exterior of the building. Gilbert and Donnelly first discussed and, after consultation with the commission, decided that the building should have monumental bronze doors with sculptured panels depicting important events in the development of the law. Their intention was to make these bronze doors equally impressive as the "Rogers Doors" of the Capitol and to have the country's two most impressive sets of bronze doors located near each other in Washington.

The commission was in total agreement and, together with other interested and friendly lawyers and historians, suggested the important events to be depicted in the door's panels. The actual creation of the scenes to illustrate these events was left primarily to Cass Gilbert and John Donnelly.

4. Justinian Code. Roman (Byzantine) Emperor Justinian announces in the sixth century the formulation and printing of the Corpus Juris, the first formal codification of the law and the first actual lawbook.

5. Magna Charta. King John is shown at Runnymede on June 15, 1215, affixing his personal sovereign seal at the demand of a stern and representative baron, thus guaranteeing that "every person should be protected in the enjoyment of his life, liberty, and property, except as they may be declared to be forfeited by the judgment of his peers or the law of the land."

By this time John Donnelly for the most part was limiting himself to the administration of his company's business affairs, leaving the responsibility for the actual design and creation of the final products to his two sons, John, Jr., and Desmond. For the Supreme Court Building, Desmond Donnelly moved to Washington and worked mainly on the stone and plaster decorations. John, Jr., stayed in New York and worked primarily at the firm's studio at 335 East Forty-sixth Street. It was he who thoroughly researched, primarily at the New York Public Library, and precisely formulated the scenes depicting the eight historic events for the door's panels. Modelers, working under his direct supervision and often with his shoulder-to-shoulder help, created the actual clay models and subsequently the plaster molds from which the bronze panels were to be cast.

When the molds for all of the panels and also the decorative borders around them were finished, they were sent to the General Bronze Corporation of Long Island City, New York, for the actual casting and creation of the bronze doors, which wound up weighing six and one-half tons each. The doors were shipped to Washington in the spring of 1935 and installed by the George A. Fuller Company, the building's general contractor.

Each door is seventeen feet high by four feet and nine inches wide. When the doors are fully closed, they create a single width of nine and one-half feet. Each door has four panels, all of which are the same size, each having an image size of thirty-two inches wide by thirty-four inches high, plus a two and one-half inch wide decorative border and a three-quarter inch wide frame for an over-all outside dimension for each panel of thirty-seven inches wide by thirty-eight and one-half inches high.

When viewed in sequence, the series of great events starts at the bottom of the left-hand door and reads

6. Westminster Statute. King Edward I watches with approval as his chancellor (secretary) announces and publishes the Statute of Westminster I in 1275, thus achieving one of the greatest legal reforms in English history.

7. Coke and King James I. Great Britain's Lord Chief Justice Coke physically and successfully bars King James I (right) from entering the courthouse and sitting as a judge in the King's Court, a successor to the very ancient "witenagemote" (council) of the Saxons, thereby assuring that the court would be independent of the executive.

upwards and thereafter upwards from the bottom of the right-hand door, showing and memorializing, by the inclusion in each panel of high-relief sculptures, the two people most important to the event.

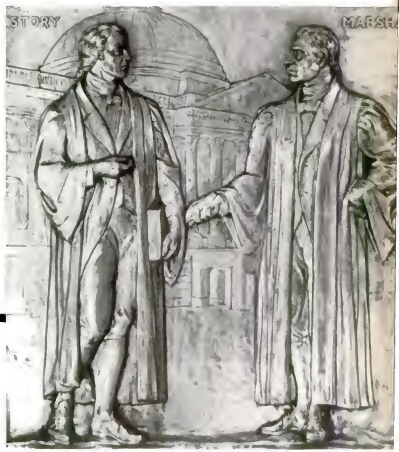
Through the perception of Cass Gilbert, John Donnelly, and their advisers, together with the unique patience, fortitude, and total artistic skill of John Donnelly, Jr., we have in these eight sculptured panels a unique, thoughtful, and visible record of the development of the law from the earliest times, indicating that the origins and development of the law lie in discussion and debate on important questions by educated laymen, judges, advocates, and scholars. Based on this, the law has been codified and organized to make possible a continuing effort for human rights, law reform, and equity. Concurrent with these efforts has been a continuing insistence on the establishment and maintenance of a truly independent judiciary.

This is an important lesson and message, and it is entirely appropriate for it to be permanently and monumentally memorialized in the doors at the entrance to the highest court in the land. ▲

David Mason is a career lawbook salesman now living and working in Baltimore after having worked in the same vocation in Indiana, Florida, Washington State, Alaska, and California. He holds a B.B.A. from Butler University and studied law at Indiana University.

Author's Postcript

I am continuing my research about the Supreme Court's bronze doors, and I would appreciate hearing from anyone with information or comments about them, especially about how the scenes depicted were suggested, discussed, and determined, and who participated in the decisions. My address is 1106 Cathedral Street, Baltimore, Maryland 21201.



8. Chief Justice Marshall and Justice Story. These two great Supreme Court jurists, who served together on the bench for years, are shown with Marshall on the right and the Capitol in the background discussing American judicial independence and *Marbury* v. *Madison* (1803), which declared the 1789 Judiciary Act unconstitutional, thereby asserting the Court's full authority to strike down an act of Congress. This established the judiciary as a fully independent third branch of the government.

Preserving Consumers'

Claims and Defenses

The F.T.C. has knocked out the holder in due course doctrine in consumer transactions. Here's how the new rule works.

By Margery Waxman Smith

WHEN Alice agreed that her basement needed waterproofing, she believed all the things the salesman said as he stood at the front door. He told her he was conducting a survey, described the terrifying things that "ground water" can do to a foundation, and suggested that Alice sign an easy payment plan contract to waterproof her basement. The image of her home, representing twenty years of payments, cracking and washing down the street during the next hard rain convinced Alice to sign.

But she was indignant when the waterproofing spray paint washed away with the first rain. She was even more incensed when she received a payment book from the Ace Finance Company, located in another state. Twenty-five hundred dollars over thirty-six months was the amount owing. When Alice finally succeeded in contacting Ace, a man who refused to identify himself told her she had to pay the money.

Under something called the "holder in due course" doctrine, the folks at Ace weren't concerned whether the waterproofing worked or whether the company had even attempted to do the job. Ace had never promised Alice anything, and Ace was not responsible for Alice's problems with the waterproofers. All that concerned Ace was the money. And the law sided with Ace.

Although Alice's case may not be the typical consumer credit experience, its outcome is not a surprise. The holder in due course doctrine has been a way in which a good-faith purchaser of commercial notes can protect itself from possible attack on creditor's rights and in which many disputes as to rights and obligations of creditors can be resolved. The doctrine has long roots going back to English common law. In the ancient controversy of *Miller* v. *Race* (1758), a man had accepted in good faith a note on the Bank of England, a negotiable instrument—the equivalent of money—conferring no obligation on its bearer or on the bearer who held it before him. The court held that his right to the note, acquired in a legitimate transaction, was not impaired by the fact that the previous transaction in which the note had passed from one party to another had been a theft.

But *Miller* v. *Race* bears only the most superficial similarity to the issues raised today by third-party financing of consumer transactions. The lender who buys a credit contract or for a fee agrees to finance a purchase is hardly in the same situation as that unwitting litigant. The lender is not accepting money for service but is buying the right to the proceeds of a transaction still in progress—a transaction in which obligations pend on both sides. If one claims the right to demand fulfillment of one set of obligations, it is not unjust to expect he will assume responsibility for fulfillment of those obligations that constitute their *quid pro quo*.

With the dramatic increase in consumer credit in the recent decades, it became the widespread practice for retailers of big-ticket items to arrange to have financing intermediaries hold and collect payment on consumer debt instruments. This practice brought benefits to the consumer by increasing his access to credit, but the terms under which ownership of the debt has been transferred often work to his disadvantage. While the seller's right to receive payment was transferred to a third party, the seller's obligations to honor the promises and representations made about the product were not. The result was that the consumer lost his power to

exact satisfaction by withholding payment. He was left dependent on the good will of the seller or on costly and time-consuming redress through the courts.

In May of 1976 the Federal Trade Commission attacked this problem head on by promulgating a trade regulation rule that provides that third-party holders of credit contracts, as defined in the rule, are subject to claims and defenses the debtor could assert against the seller of the goods or services obtained with the funds advanced under the contract. In other words, rights and obligations move together and cannot be separated. The creditor stands in the shoes of the seller.

The rule not only requires that a notice to this effect be included in any consumer credit contract, but it also prohibits a seller who arranges outside financing for a buyer from accepting the proceeds of that financing in payment unless the loan contract between the outside financing party and the buyer contains a similar notice.

The purpose and effect of the new rule are simply to establish that creditors may be held accountable for the promises of sellers and thereby to ensure that the consumer's rights are not extinguished with transfer of his debt. That is its only effect.

The rule will not permit a consumer to recover more than he has paid or more than he could have recovered from a self-financed seller. It does not create a warranty claim or defense if none previously existed because a product was sold "as is," and does not extend the life of a claim past the statutory limit set by a local jurisdiction. Nor does it permit a consumer who has a claim against a seller to assert that claim against the holder of the seller's credit contract unless the claim and the contract have arisen from the same transaction.

Rule Does Not Extinguish Other Rights

The effect of the rule is to protect the consumer against having his rights eliminated, not to grant new rights. The words "claims and defenses," as they appear in the notice, simply incorporate those things that, as a matter of other applicable law, are legally sufficient claims and defenses in a sales transaction. Appropriate statutes, decisions, and rules in each jurisdiction will control, and the pertinent rules of law and equity, including rules of evidence, procedure, and statutes of limitation will continue to apply.

By the same token, however, the rule does not extinguish other rights the consumer may have as a matter of local, state, or federal law. If a larger affirmative recovery against a creditor is available under state law, for instance, the consumer retains that right.

The rule does not apply to all credit instruments but only to those written obligations the rule defines as a "consumer credit contract," which is in turn defined as any written instrument that under the Truth in Lending Act and Regulation Z of the Federal Reserve Board constitutes a consumer credit contract and is used (1) to finance a sale or (2) in connection with a purchase money loan.

Simply stated, the rule affects purchases by natural persons buying goods or services for personal or household use. It does not apply to purchase of goods or services for commercial use, purchases of interests in real property, purchases of commodities, or purchases of securities. Because it relies on definitions contained in the Truth in Lending Act and Regulation Z, the rule also excludes purchases involving expenditures of more than $25,000 and the purchase of public utility services.

In order to require the notice, a contract must "finance a sale" or be used in connection with a "purchase money loan." What is meant by those terms?

"Financing a sale" is easily defined. It describes any situation in which a seller extends credit to a buyer and takes a written credit contract from the buyer in connection with the transaction. All these situations are covered by the rule with the single exception of credit card transactions, which are specifically exempted.

But what of a "purchase money loan"? When does the rule apply if the lender is a third party? That situation is more complex and requires some explanation.

Purchase Money Loans Described

It was the commission's view that consumers' claims and defenses had to be preserved when sellers arranged financing for their customers by means of referrals to direct lenders, or when sellers and direct lenders were affiliated with one another, as well as when sellers took loan contracts and transferred them to third parties. Failure to include purchase money loans made by third parties would have made avoidance of the rule easy and inevitable.

The commission also concluded that only when a creditor and a seller worked together often to finance sales by means of consumer loans, the creditor had, or should have had, access to information that would allow him to assess the likelihood of seller misconduct and to make provisions for dealing with it. Because a creditor transacts business regularly with the seller, he knows from experience the seller's record of handling claims and can arrange to shift liability under the rule's required notice back to the seller through recourse or reserve arrangements.

Although the complexities of the consumer credit market make it impossible to enumerate all the situations in which a seller and lender may engage in "purchase money loan" financing, some elaboration through examples of the common sense purpose of the "purchase money loan" provision may serve to clarify.

Because "purchase money loan" refers to a "purchase," it reaches only those consumer loans that are primarily or exclusively applied to a discrete purchase of goods or services from a particular seller. If a consumer obtains a loan and uses the proceeds for multiple purchases from different sellers, the rule does not apply.

Once the criterion that the loan be applied to a

specific purchase of goods or services has been met, the rule imposes a further requirement before a consumer loan is classified as a purchase money loan. The specific seller who receives the proceeds of the loan must, as a matter of practice, refer loan customers to the lender or must be affiliated with the lender by common control, contract, or business arrangement.

The word "refers" is intended to reach those situations in which a seller, in the ordinary course of business, sends buyers to a particular lender for credit which is to be used in the seller's establishment. No specific number of referrals is specified in the rule. The distinction is between instances in which a seller is merely passing along information about places where buyers may obtain credit and instances in which a seller is acting as a conduit for financing and channeling buyer-borrowers to a particular lender or limited group of lenders.

The alternative criterion for establishing the relationship necessary for a "purchase money loan" is affiliation. The rule requires a seller to ensure that the notice is used in a customer's loan contract when the seller is "affiliated with the creditor by common control, contract, or business arrangement." This requirement covers the myriad situations in which seller and lender are engaged in a mutually beneficial effort to promote the seller's sales through the use of the financer's lending resources and vice versa. The contract or business arrangement must be sales related; the rule does not include the many possible business relationships that do not bear directly on the financing of consumer sales. For example, a commercial checking account is not an affiliation within the meaning of the rule, nor is a commercial credit agreement between the seller and a credit institution that has no relationship to consumer sales activities or their financing. A commercial lease, the factoring of accounts receivable, a general business loan, or other similar commercial arrangements or contracts do not invoke the rule by themselves.

The Consumer Must Take His Chances

Any intervention by the government into the consumer credit market must be carefully scrutinized as to its possible adverse impact. Will it drive up interest rates? Will it reduce the availability of credit? In short, will it add to the cost of consumer purchases?

A survey of credit institutions done for the F.T.C. by Yankelovich, Skelly, and White suggests that in the vast majority of cases the answer so far is "No."

But what of the few instances in which it does—when lenders forced to assume risks formerly borne by consumers raise interest rates to compensate themselves, or when lenders, aware that they must stand behind the promises of sellers, become less willing to finance sales by sellers whose good faith they doubt. Are these not new costs to the consumer?

The answer is "No" again. The cost to the consumer of compensating the lender for assuming new risks is nothing more than the indirect and evenly distributed payment of costs the consumer previously bore in the form of the risk he assumed all by himself—the risk of payment without performance.

Margery Waxman Smith is executive director of the Federal Trade Commission. She received her A.B. from Smith College (1964) and her J.D. from George Washington University (1967).

There is every reason to suspect that by shifting this cost or risk from the consumer to the lender the aggregate amount of the costs or risks will be reduced. No individual consumer wields market power great enough to alter the behavior of a seller. Nor do many consumers deal frequently enough with a single seller to assess the probability of that seller honoring his obligations. The consumer must take his chances. If he is burned, he may withhold future patronage, but doing so will not dim the business prospects of the seller materially. Nor are the courts a realistic avenue of redress for the consumer, since costs are prohibitive. In short, while the consumer may not like the risk he assumes in buying a product financed by a third-party creditor, there is very little he can do about it. The converse of this fact is that there is very little incentive on the part of sellers to minimize that risk.

Shifting the risk from the consumer to the creditor changes that state of affairs dramatically. The creditor is in a position to cast the risk back to the seller, where it belongs. While the consumer deals once with a seller, the lender deals in volume. The single consumer is of little business consequence to the seller, but the lender is of great consequence. Information regarding a seller's past performance is rarely available to the consumer but readily available to the professional lender. The lender is in a position to demand that the seller pay the cost when he fails to perform as promised. When that happens, the seller has something he did not have before this rule—an incentive to reduce those costs. Since ultimately all costs are borne by the consumer, he is the beneficiary of that reduction.

Had this rule been in effect the day Alice was conned on her front doorstep, she'd have been in a different ball game. She might never have seen the salesman again; she might have discovered later that the company he claimed to represent did not exist; she might even have seen her house turn into a mobile home with the next heavy rain. But she would not have had to pay folks at Ace Finance Company for the privilege. ▲

American Bar Center

The Association's 99th Year

Highlights of 1976–77

- A.B.A. Adopts Lawyer Advertising Rules
- Burger Calls for Tighter Lawyer Discipline
- A.B.A. Votes Grand Jury Reforms
- Lawyer Liability Problems Grow
- Additional Judgeships Backed by A.B.A.
- Prepaid Legal Plans Catch Hold
- A.B.A. Supports Appellate Merit Selection
- Federal No-Fault Auto Insurance Gets New Life
- Specialization Standards Urged

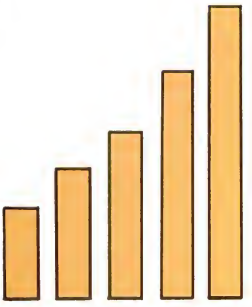
Annual Report to the Membership

This sixteen-page report represents the Association's most comprehensive effort to date to provide the entire membership with an accounting of one year's operation. The annual report includes a review of 1976–77 by the outgoing president, Justin A. Stanley, and a preview of the Association's centennial year by 1977–78 president, William B. Spann, Jr. The Association's activities during the past year are highlighted in "Year in Review" and "A.B.A. Speaks Out in Washington." Five pages of financial, membership, and Fund for Public Education reports are also included.

Reprints of the annual report will be made available to Association members and the general public at nominal cost. Further information may be obtained from the Department of Public Relations and Information, Communications Division, American Bar Association, 77 South Wacker Drive, Chicago, Illinois 60606.

American Bar Association Annual Report 1976-1977

Growth Highlights



- New member growth for 1976–77 totaled 24,173—the largest gain since 1955–56, and the second largest gain in new members in the history of the Association.
- Membership in the Young Lawyers Division surpassed the 100,000 mark, thereby doubling the section's size since 1970.
- National institutes, sponsored by A.B.A. sections, more than doubled in number from 1975–76 with more than thirty programs and nearly 10,000 participants.
- Attendance at the annual meeting in Chicago shattered all previous records with more than 9,000 paid registrants; family and guests further swelled the total to 15,500 participants.
- An all-time record 340 media representatives registered for annual meeting coverage in the A.B.A.'s news center, including seven television camera crews, numerous national and local radio reporters, and journalists from a broad cross-section of the print media.
- Total A.B.A. revenues neared the $30 million mark with half the total coming from member dues, more than $7 million from grants and contributions, and more than $1 million from advertising.
- Nearly 100,000 Law Day programs were presented in 1977—35,000 of these in schools and universities, with attendance exceeding 5 million; radio and television carried the Law Day message to another 30 million people.

Service to the Public and the Legal Profession

The objectives of the American Bar Association are twofold: service to the public and service to the legal profession. What the Association does to achieve these objectives is the focus of this effort—the annual report to the membership.

A significant portion of the Association's time and money is spent on a wide range of activities to improve the administration of civil and criminal justice and the availability of legal services to the public, including the poor and non-affluent middle class. These public service activities encompass such varied areas as environmental and energy law, election reform, housing and urban growth, and juvenile justice. Often they are reported by the nation's media and become the focus of public attention and public attitudes.

Equally important, however, is the Association's service to the profession. The Association encourages professional improvement of its members by promoting continuing legal education and the improvement of legal practices and procedures. The A.B.A. works to maintain high standards of legal education and professional ethics and conducts research in many fields of specialized law—efforts which ultimately benefit the profession and the public.

Unfortunately, these and other organizational efforts on behalf of its membership are often lost in reports of A.B.A. activities by outside media sources. It should be emphasized therefore, that the A.B.A. continually seeks to improve our laws and the legal system and is also taking positions and action on the bread-and-butter issues that are of utmost concern to the practicing lawyer.

Public confidence in the legal profession is vital to the continuing success of every lawyer. Without it, the legal community cannot maintain its ability to regulate its own affairs and ensure the highest standard of professionalism. With it, the millions of Americans who have never availed themselves of legal services are provided the necessary trust to overcome their fears of the unknown. Trust, in this era of skepticism, must be earned. The A.B.A. is working on a broad front to build a level of confidence that will serve the public and serve you, the practicing lawyer.

Justin A. Stanley

William B. Spann, Jr.

S. Shepherd Tate

National Voice

Through its role as the national voice of the legal profession, the A.B.A. recognizes the increased urgency of open communication concerning its positions and activities. In these times, when the actions and objectives of most institutions are being challenged, the Association is taking special pains to ensure that its actions are communicated to all levels of the profession and to the American public. This annual report is only one example of the Association's efforts toward that end.

During 1976–77, for example, Justin A. Stanley, William B. Spann, Jr., S. Shepherd Tate, and various A.B.A. officials actively sought out the media for interviews and comments on the issues impacting the legal profession. A.B.A. officials met with one or more media representatives in nearly all of the top news markets. They expressed their views on such subjects as court reform, streamlining litigation, and prison conditions to reporters from *U.S. News and World Report*, *Wall Street Journal*, *Christian Science Monitor*, *New York Times*, *Newsday*, and *Newsweek*, among others. Numerous radio and television appearances were also made, including those on the nationally televised *Today Show*, the *MacNeil-Lehrer Report*, and *Face the Nation*.

Role in Washington

Increasingly, many of the public and professional concerns of the membership are affected by the actions of federal agencies and the Congress. Therefore, the Association maintains a Governmental Relations Office in Washington, D.C., to serve as the eyes, ears, and voice of the organized bar and its members.

The office voices the views of the association on a wide range of issues (see "A.B.A. Speaks Out in Washington") to numerous government entities. Toward this end, a host of A.B.A. witnesses represented the Association and the profession in 1976–77 before congressional committees.

Through the weekly *Washington Summary* the office communicates the status of important bills and regulations to state and local bar associations and to all sections and committees of the Association. The office's monthly *Washington Letter* reports major governmental activities which affect the legal profession.

Communicating with Bar Groups

This past year the A.B.A. made a special effort to improve communications with state and major local bar associations. The Task Force on Bar Activities and Services planned and conducted four regional "Caravans" in New Orleans, Chicago, San Francisco, and Boston. A.B.A. leaders and their state and local counterparts met to discuss common problems in administrative areas and issues affecting all levels of the profession. As a result, neglected channels of communication have been reestablished.

Continuing efforts by the A.B.A. to provide service to the state and local bars include the bar association operational surveys program, the American Bar Center visitation program, and the publication of *Bar Leader*. All of these vehicles are intended as catalysts to identify and review problems that are common to bar associations.

Open Hearings and Meetings

Throughout the past year, the Association has sought the input of the profession and the community at large through a series of open hearings and meetings on such issues as specialization, minor disputes resolution, fair trial–free press, and pro bono publico work. The object of these gatherings is twofold: to present the A.B.A.'s preliminary opinions and to listen to the opinions of others inside and outside of the profession. Perhaps the prime example of this open approach was the hearings conducted by the Task Force on Lawyer Advertising, which listened to and thoroughly considered all expressed opinions on the subject of lawyer advertising.

Annual Report

In the annual report which follows, the Association has attempted to highlight some of the more significant actions it has taken in the past year to improve its service to the public and the profession. This accounting is not intended to be comprehensive. Space limitations prohibit mention of many divisions, departments, sections, and committees of the A.B.A. which toiled long in productive fields this past year. The task of condensing the activities of a vast organization such as the American Bar Association—the largest voluntary professional organization in the world—is an awesome, perhaps impossible one.

What we have tried to do is give you, the membership, a capsulized view of the Association, its programs, direction, and financial status.

A.B.A. President Reviews His Year in Office

Justin A. Stanley completed his term as president of the Association at the close of the annual meeting in Chicago. During the 1976–77 year, Mr. Stanley voiced his own particular concerns and the policy positions of the Association before countless bar gatherings across the country, at congressional hearings, to media representatives, and to the American public. Here Mr. Stanley answers questions about highlights of his year in office.

After the chief justice and the attorney general, you were selected by your peers in a "U.S. News and World Report" survey as the third "most influential" law figure in the United States. Why is the office of American Bar Association president such a significant position?

The principal reason, I suppose, is that the A.B.A. president serves as a spokesman for the profession and, in a sense, for the system of justice itself. Lawyers, judges, and the courts play a central role in the life of this nation. In the process they inevitably attract a good deal of criticism that needs to be evaluated and responded to. Obviously, many groups besides the A.B.A. are involved in that effort, but we are the biggest, and probably the most visible. I believe we are influential. It's that responsibility that makes the job exciting.

Have you been able to translate that influence into effective action?

Well, I certainly have tried, and I hope there has been some success. Let me give you an example. When I became president-elect, I had the idea, based on some personal experiences, that there was a great need—particularly in our large cities—to develop, improved means for resolving minor disputes between citizens. The kinds of disputes that I had in mind involve no constitutional questions, no significant statutory or precedential questions, and relatively small amounts of money. Society's only interest in them is that a means be provided for their resolution. If we do not do so, we breed a cynicism and a sense of frustration among the parties—in whose eyes, of course, the disputes are anything but "minor." They may conclude that the justice system was meant to serve others, but not them.

After investigating the question more thoroughly, I was able to name a first-rate special committee whose task it was to learn more about the existing small claims courts and other tribunals for the resolution of such disputes, and to develop some models. In May the A.B.A. sponsored a national conference on this subject in New York. I think it is fair to say that we have taken a leadership position on the issue—an issue, incidentally, which is receiving increasing attention from the media, consumer groups, and the public. I don't say that

Justin Stanley addresses A.B.A. Assembly.

we created this movement, or that it wouldn't have gotten anywhere without us. But it's a fact that our support has been substantial, and that we have provided it a significant boost.

You spent a good deal of time visiting prisons and jails around the country during your year as president. Why?

It is extremely important that lawyers learn first-hand about our correctional system. I say this for a number of reasons. First, much as we would like to do so, the problem is not one we can simply turn over to the so-called experts. As Sherman R. Day, former director of the National Institute of Corrections, has said, "We cannot take offenders and overcome a lifetime of failure, not without help. Correctional programs alone cannot be expected to offset the effects of broken families, a decline in religious belief and training, the loss of authority in our schools, and the general slackening of self-discipline."

Second, you don't need to be an expert to understand what is wrong with most of our prisons. Probably there is a general public consensus that they should be sanitary, that they should be relatively free of pervasive noise, and that inmates should be safe from brutal physical and sexual attacks from fellow prisoners. Yet many of our prisons do not meet these basic standards. It may be that unless the public is forced to confront the realities of existing conditions, they will never improve. The courts have played a central role in developing minimal constitutional standards prisons must meet or be closed. But I think that lawyers, working with the media, have an obligation to educate the public about our prisons. It is doubtful that legislatures will act to remedy the problem so long as the existing atmosphere of public indifference continues.

Perhaps I should add that there is no shortage of good people working in the corrections field, and no shortage of constructive ideas. My impression is, for example, that our federal prison system even today is in pretty good shape. What is needed is more public commitment—not only to appropriate funds to build better institutions but also to assume a more active responsibility in the area of corrections.

In a number of speeches over the past year you have mentioned the litigiousness of American society. What do you think accounts for this?

I can only speculate, of course, but a number of factors seem to me to be involved. The growing complexity of our society has been accompanied by increased regulation, much of it technical, giving rise to disputes over its interpretation. Population growth has had an enormous impact, which has been exacerbated by the increasing concentration of our population in urban areas. It is a generalization, but I think a fair one, that our people are less inclined than perhaps they once were to accept difficulties, frustrations, and problems as a part of life. The assumption is that there is someone to blame, and that compromise or accommodation is a sign of weakness. In a way that perhaps no one fully understands, I think this social atmosphere is related to the factors that Sherman Day mentioned about corrections: the weakening of family ties, the slackening of self-discipline, and the decreasing legitimacy of institutions that previously provided more direction to our lives and fostered a sense of trust among us.

Can the American Bar Association do anything about that?

Probably not, as such. But we can do things to adapt the litigation process to meet new demands. Our work in minor disputes, which I mentioned earlier, is one example. For another, the Litigation Section, at my request, created a Special Committee on Abuse of Discovery, which over the past year has investigated possible avenues of reform in our pretrial practice. It has proposed changes to the federal discovery rules that would limit the scope of discovery to matters at issue in the case and would provide a better means for obtaining judicial control of discovery in cases in which it is being abused. We also have had in the past year a special task force, which, working with the Appellate Judges Conference, has compiled a manual describing some of the successful experiments undertaken across the country to ease the burdens on appellate courts. Projects such as these do not really get at the factors that have been responsible for the flood of litigation, but they can help to reduce delay and expense.

We also could recommend such things as the imposition of contempt fines by courts for the filing of frivolous suits or the assessment of costs against losing parties in nonfrivolous litigation.

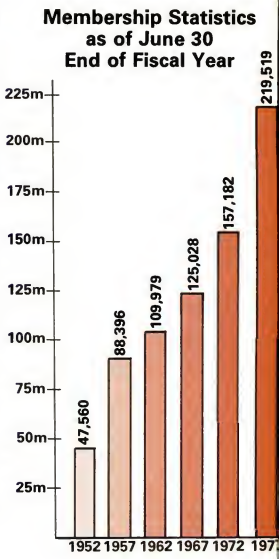
Has it been a good year?

Of course it has been busy, exciting, and enjoyable. Some aspects of it have been pretty heady stuff, but there are always leavening influences.

At our Conference on Minor Disputes Resolution in New York, Chief Justice Burger came to speak at our final luncheon. I presided. Some reporters were there and also a couple of very energetic photographers. They got the chief justice and me out on a balcony next to the room where the luncheon was being held and took a whole slew of pictures of us together. Then as we stepped inside, one of them took me aside and said, "Please don't misunderstand this, sir, but who the hell are you!"

I've been thinking about that ever since.

A.B.A. Membership Report



Membership Gains

New member growth for fiscal year 1976–77 totaled 24,173, the largest new member gain since 1955–56, and the second largest gain in new members in the history of the Association.

As of June 30, 1977, membership totaled 219,504 versus 210,540 a year ago.

Although the growth exceeded that posted for all previous years except one, net membership growth declined from 12,283 members a year ago to 8,963. This was a direct result of the dues increase, which had an adverse impact on member retention and boosted the cancellation rate above the norm.

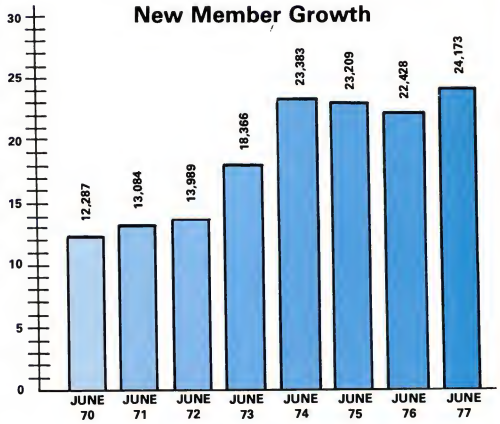
The increase in dues did, however, produce revenue in excess of $4 million over the previous year, providing the Association with much needed funds to carry out its programs and activities.

Coincident with the mailing of the 1977–78 dues bills, the Membership Department has been closely watching the collection of dues and reporting to the Finance Committee of the Board of Governors. At this time it appears that there is not a significant residual effect from the dues increase. In fact, cancellations are running behind a year ago by approximately 60 per cent.

New Member Statistical Data

According to the new admittee lists received by the Membership Department, it can be estimated that approximately twenty-five thousand lawyers are admitted to practice for the first time before the bar of a state, territory, or possession of the United States on an annual basis. The following statistical information has been compiled using this figure and A.B.A. membership data.

- 25,000 lawyers were admitted to the bar for the first time in 1976–77.
- 24,173 lawyers joined the A.B.A. in 1976–77.
- 17,765 lawyers joined the A.B.A. within twelve months of their bar admission date.
- 70.7 per cent of the lawyers joined the A.B.A. within twelve months of their bar admission date.
- Law Student Division transfers accounted for 6,751 new members or 27.91 per cent of all new members.
- The mean age of the new member joining in fiscal 1976–77 was 30.76.
- 21,064 or 87.07 per cent of the new members were under age thirty-six and became members of the Young Lawyers Division.
- Out of the 24,173 new members who joined the Association last year, 1,764 or 7.30 per cent had been practicing law for ten or more years.
- 48.21 per cent of the new members joined at least one dues paying section, while 22.01 per cent of the new members joined more than one dues paying section.
- The sections with the greatest number of enrollments were: Corporation, Banking, and Business Law, 2,817; General Practice, 2,204; Litigation, 2,112; Taxation, 1,943; and Real Property, Probate, and Trust Law, 1,560.



Year in R

Year Ends with Fireworks: The A.B.A.'s 99th year ended with fireworks, both at the president's reception at Navy Pier (above) and on the floor of the House of Delegates (right). The fireworks over the waters of Lake Michigan ushered out the Association's year, but those in the House ushered in the continuation of disputes concerning lawyer advertising and the self-regulation of the profession. By any yardstick, the annual meeting in Chicago was the highlight of 1976–77. Attendance broke all records as more than 15,500 lawyers, family, and guests descended upon Sandburg's "City of the big shoulders," headquarters for the Association since the 1920s. Along with a full schedule of business meetings, law-focused programs, and social events, they were privileged to hear addresses by such national figures as Vice President Walter Mondale, Attorney General Griffin Bell, House Ethics Committee counsel Leon Jaworski, former astronaut Neil Armstrong, and A.B.A. President Justin Stanley and President-Elect William Spann, Jr. The week and the business year ended with much accomplished. What follows in this "Year in Review" is only a quick look over the shoulder at a few highlights of the year past, before moving on to the challenges looming on the horizon of the year ahead.

Lawyer Advertising: The most publicized and debated issue of the year was what response the American Bar Association should make to the Supreme Court's decision in *Bates* v. *State Bar of Arizona*. In June the Court ruled that absolute bans on lawyer advertising violate the First Amendment right of free speech and that at least some forms of lawyer advertising must be permitted.

At the 1977 annual meeting in Chicago, the House of Delegates approved, after extensive hearings and debate, new rules that spell out in detail the kinds of information that may be given in lawyer advertising. The House amended the A.B.A.'s Code of Professional Responsibility to authorize print and radio advertising. Television advertising is not specifically allowed by the new rules but is left to the discretion of state disciplinary agencies.

Adoption of the new rules, prepared by the A.B.A. Task Force on Lawyer Advertising, headed by President-Elect S. Shepherd Tate, came despite strong sentiment in the House to defer action and in preference to a second task force discussion proposal that would have permitted advertising content except that which was false, deceptive, or misleading. The House of Delegates did approve dissemination of the second proposal to state and local bar associations for their information.

Grand Jury Reforms: At the annual meeting in Chicago, the House of Delegates endorsed a series of grand jury reforms, including giving witnesses the right to take lawyers with them into grand jury proceedings. This particular proposal was adopted over strong opposition by Attorney General Griffin Bell, who favored having a special at-

eview 1976-1977

torney in the jury room to advise witnesses and characterized the proposal as "the lawyers' relief act."

The delegates also voted to reaffirm previous Association support of broad immunity for grand jury witnesses. In all, the House approved twenty-five grand jury reform measures, most of them found in H.R. 94, a reform bill given good prospects for passage. Among other standards approved were: a maximum one-year imprisonment for witnesses who refuse to testify; a requirement that witnesses be warned if they are investigative targets; a ban on grand juries naming unindicted coconspirators; a requirement that transcripts be made of the proceedings; and a prosecutorial duty to exclude evidence inadmissible at trial.

Lawyer Specialization: Since 1969 the Committee on Specialization has visited states with specialization programs, gathering data about the programs and about lawyer and public attitudes concerning specialization. Based on its findings, the committee recommended in 1977 that the states should regulate information provided the public for truthfulness and quality assurance, promulgate definitions for specialization categories and standards, and permit lawyers to use a variety of forums to inform the public about their specialties.

It also recommended that the A.B.A. issue guidelines to ensure protection of the public and fairness for all lawyers and assist the states by formulating model regulatory procedures and by monitoring their work.

At the root of the recommendations is the committee's belief that "specialization regulation is a partial answer to the need for easier access by all citizens to quality legal assistance."

After revising the portions of the specialization report affected by the A.B.A.'s new rules on lawyer advertising, it is expected that the report will be resubmitted to the House of Delegates at the 1978 midyear meeting.

Electoral College Reform: Another highlight of the past year was renewed interest and controversy concerning abolishing the Electoral College and providing for the direct election of the president and vice president of the United States. A constitutional amendment to accomplish this goal was urged by the Association's president and the chairman of the Committee on Election Reform on February 2, 1977, before the Senate Judiciary Committee. Efforts by the A.B.A. committee to have this amendment adopted will continue.

National Judicial College: On April 15, 1977, the Board of Governors authorized the National College of the State Judiciary to incorporate as a Nevada nonprofit corporation and to change its name to the National Judicial College. This action took place at the board's meeting in the Judicial College Building at the University of Nevada in Reno. Incorporation was later effectuated on May 11, 1977, when the articles of incorporation were filed. The institution will remain closely affiliated with the Association, with a status similar to that of the American Bar Foundation.

Merit Selection of Judges: The House of Delegates at the annual meeting in Chicago adopted a resolution supporting the principles of nonpartisan merit selection of federal judges. Chiding

Vice President Mondale

Leon Jaworski

Griffin B. Bell

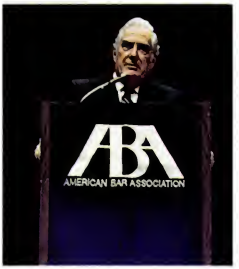
Year in Review

President Carter for his selections of members of the panels of the circuit judge nominating commission he created earlier this year, the House recommended that a "nonpartisan" commission be established by the president. It also endorsed continuation of the A.B.A.'s program of evaluation of the judicial qualifications of candidates and nominees for federal judgeships on request of the attorney general and the Senate.

Philadelphia Legal Clinic Opened: In 1976 the Committee on Delivery of Legal Services awarded a $60,000 grant to the Philadelphia Bar Association for the development of a legal clinic, and in November of 1976 the Fifty-ninth Street Legal Clinic was opened. During the first six months of operation the clinic handled one hundred divorce cases, twenty-one mortgage foreclosures, twelve real estate matters, eight preventive check-ups, and thirty-five small claims. Total revenues during this period were about $9,000, and total expenses were nearly $30,000. The board of directors for the clinic approved limited (including price) advertising in newspapers of general circulation in Philadelphia, the first appearing in the latter part of March, 1977. But there have been no dramatic increases in client load.

National Institute Programs Double: In 1976–77, the Division of Professional Education, through the sponsorship of various A.B.A. sections, ran a total of thirty-one national institute programs. This more than doubled the programing for the previous year, and it is anticipated that between forty to fifty institutes will be scheduled for 1977–78. A sampling of topics for last year's institutes includes trial of an antitrust case, professional liability of trial lawyers, the tort liability system, corporate takeovers, and a series on law office economics and management. National institutes were held in New York City, Chicago, Los Angeles, San Francisco, and Washington, D.C. As an example of the timeliness of these programs, national institutes were held on state and gift tax reform and income tax reform within two weeks of the signing of the Tax Reform Act of 1976.

Burger Speech Highlights Midyear Meeting: At the midyear meeting in Seattle, Chief Justice Warren E. Burger delivered a message to the nation's lawyers that tighter discipline of errant attorneys is on the horizon. Departing from the prepared text of his annual report to the A.B.A., Burger commended efforts by the Association in the last few years "to protect the public from unworthy members of our profession," and added, "I sincerely hope that effort continues." The chief justice's remarks took on added significance because of his role as head of the Judicial Conference of the United States, which is considering a proposal for tightening discipline in federal practice. In addition, Burger for the first time publicly endorsed merit selection of federal judges by creation of judicial nominating commissions, whose members would include lawyers, non lawyers, and judges.



Chief Justice Burger


Young Lawyers meet in Chicago.

Lawyers' Professional Liability: Through its Special Committee on Lawyers' Professional Liability, the A.B.A. is providing information and assistance to state and local bars. The committee has made available a state-by-state report which describes present insurance coverages, premiums, and special state projects. This report is revised monthly through the up-date program.

A primer on malpractice insurance has also been prepared. It discusses terminology, available policies, premium computation, alternatives to private insurance, and ways to reduce malpractice losses.

The committee is exploring the possibility of offering a national excess coverage program and A.B.A. contingency plans in case present costs and availability deteriorate further.

Young Lawyers Stress Public Interest: To establish a meaningful dialogue among young lawyers, the Young Lawyers Division held five regional leadership meetings during the bar year.

The focus of these meetings was on discussion and implementation of the public interest programs that the division has pioneered, including legal services for the deaf, law student counseling, and legal assistance for Indo-Chinese refugees.

To date, more than eighty new pro bono publico programs have been undertaken by thousands of young lawyers. More than a hundred additional public service projects are planned.

Prepaid Legal Conference: In April the A.B.A. sponsored a National Conference on Prepaid Legal Services in Phoenix. Several speakers, among them Sandy DeMent, executive director of the National Resource Center for Consumers of Legal Services, and Robert J. Connerton, general counsel of the Laborers' International Union of North America, said that the expansion of prepaid plans expected

in 1977 is happening—more and more are being formed, and new users are being signed up for existing offerings. Optimism pervaded the meeting. Calvin L. McMillan, a director of the American Prepaid Legal Services Institute and president of Prepaid Legal Services of Kansas, said, "No attorney should make the mistake of thinking that prepaid isn't going to make it. It's going to happen big. Lawyers who think it won't help them and the public just haven't been exposed."

Prepaid legal services are also coming to the automobile industry. More than 150,000 present and retired employees of Chrysler Corporation will now be covered by a plan negotiated with the United Automobile Workers. The company agreed to the plan because of 1976 changes in the tax law that exempt prepaid legal benefits from taxation as income.

Conference on Minor Disputes: In May of 1977 the A.B.A. conducted a National Conference on Minor Disputes Resolution at Columbia University Law School. It was a significant step, as minor disputes have long been considered the backwaters of the legal profession. Many lawyers are uninterested in mundane, unprofitable cases, and small claims courts are sometimes considered Siberia by the judiciary.

But the conference indicated that those in a position to make changes are beginning to be heard. Chief Justice Warren E. Burger gave his enthusiastic support to improving the methods of resolving minor disputes "if we are to avoid the frustrations, tensions, and hostilities that often flow from unresolved conflicts."

A.B.A. President Stanley advocated trying new approaches as well as improving the small claims courts. He said that the Association hopes to solve the problem "through broadening access to existing small claims courts and developing neighborhood tribunals that will offer mediation, arbitration, and other means of resolution."

Law Day Programs Reach Millions: More than 98,600 Law Day programs were presented in 1977—35,000 of these in schools and universities—with attendance exceeding 5,400,000. Among those who participated were Secretary of State Cyrus Vance and Attorney General Griffin Bell. The theme for 1977 was "Partners in Justice."

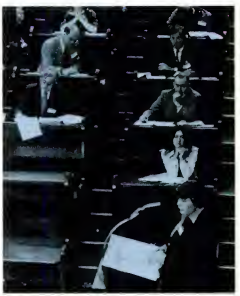
Over-all recognition of the 1977 Law Day by the nation's news and electronic media demonstrated its national importance. More than 20 million viewers saw Law Day messages on eighteen different network shows. CBS Radio presented messages to an estimated audience of nearly 11 million. Daily newspapers published an estimated 21,000 column inches of news and editorial comment—the equivalent of 132 full-size newspaper pages. In addition, the American Forces Radio and Television Service featured taped and filmed messages reaching an estimated million people in twenty-nine foreign countries and seventy foreign territories.

Reverse Discrimination: In 1977 the A.B.A. filed an *amicus curiae* brief with the Supreme Court in *Regents of the University of California* v. *Allan Bakke*. The brief, according to Justin Stanley, "urges the propriety of professional school programs that consider race and economic and educational background as relevant factors in selecting from among qualified candidates for admission." Claiming that the Davis Medical School set a "goal" and not a quota for admitting qualified minority applicants, Mr. Stanley added, "The A.B.A. does not endorse a quota system under which a certain percentage of each class must be composed of members of a certain race or class."

Legal Services Consortium Meets: The steps the legal profession can take to improve public access to legal services were discussed at an open meeting held in July of 1977 at which the A.B.A.'s Consortium on Legal Services and the Public was host. In two days of sessions in Washington, D.C., testimony was heard from representatives of about twenty consumer organizations, legal services entities, governmental agencies, law schools, and bar associations.

Among the suggestions were publication of a directory of lawyers willing to accept cases from clients in specified areas of legal practice; efforts to get state codes of professional responsibility amended so that credit cards may be used to pay lawyers; public participation on bar association committees; development of lawyer referral services in rural areas; and creation of a committee on the legal needs of the elderly.

The meeting was part of the public phase of a critical review by the consortium of A.B.A. activity in the delivery of legal services. The consortium will submit a draft proposal to a national conference of state bar leaders in New Orleans in December.



Barbara Curran of American Bar Foundation (above) at Legal Needs Conference.

Pickets (below) at midyear meeting in Seattle express concern about *Bakke* suit.

A.B.A. Speaks Out in Washington

Approximately two-thirds of the proposals that come before the House of Delegates relate to federal action. To watch federal activity and advocate positions, the Association maintains a Governmental Relations Office in Washington, D.C. In 1976–77, more than forty A.B.A. witnesses represented the Association before congressional committees.

Federal Criminal Code: The Governmental Relations Office of the A.B.A. geared up to assist Association units to obtain and examine the latest criminal code reform bill. The Criminal Justice Section originated the A.B.A.'s 1975 position, which endorsed in principle S.1 as a basis for reform of federal criminal laws and recommended several amendments to the bill. The section is analyzing S. 1437, the 95th Congress version, through its Criminal Code Revision Committee.

S. 1437 is the latest compromise of liberals and conservatives for reforming and recodifying federal criminal laws. The 308-page bill makes many changes in federal criminal law and procedure. Among its highlights are new sentencing provisions and a listing of offenses that defines them by the elements of the offense, the requisite state of mind (culpability), the circumstances under which the federal government can prosecute, and the grading of the offense (authorized sentence). Affirmative defenses and precluded defenses are described for each offense. Culpability is narrowed to four defined states: intentional, knowing, reckless, or negligent.

Legal Services: The past year has been an active one for followers of the Legal Services Corporation, of which the A.B.A. has long been a strong supporter.

At the close of the 94th Congress, the A.B.A. helped gain an appropriation of $125 million for the corporation for fiscal year 1977, an increase of almost $33 million over 1976. During the first session of the 95th Congress, the A.B.A. furnished testimony and worked toward additional appropriations for fiscal year 1978, which culminated in a grant of $205 million by Congress in July. The A.B.A. also testified in support of legislation to extend and amend the Legal Services Corporation Act. As recommended by the A.B.A., a number of restrictions on the activities of legal services attorneys were removed during committee consideration.

Judicial Pay Raises: Intensive efforts of the A.B.A. and the Coalition for Adequate Judicial Compensation helped Congress appreciate the need for salary increases for federal judges and helped defeat efforts to block the raises during the first session of the 95th Congress. Many state and local bars also joined in the effort.

Salaries of courts of appeals judges were raised to $57,500, and the salaries of district court judges went up to $54,500.

The pay increases were passed despite substantial controversy and numerous pleas for a floor vote on the pay raises which had been recommended by President Ford and supported by President Carter based on recommendations of the Quadrennial Commission on Executive, Legislative, and Judicial Salaries. The raises took effect automatically because neither house of Congress voted to disapprove them.

The A.B.A. Board of Governors adopted a resolution endorsing and supporting the commission's salary recommendations, and this action was followed by letters to the president and members of Congress, testimony before a congressional committee, and numerous contacts with key decision makers in the executive branch and Congress.

L.E.A.A. Review: While the Department of Justice began its review of the future of the Law Enforcement Assistance Administration, the A.B.A.'s proposal for a National Institute of Justice helped focus consideration on the future of research on national civil and criminal justice issues. Judge Robert Hall, chairman of the A.B.A.'s Commission on a National Institute of Justice, presented testimony before two congressional committees during the first session of the 95th Congress.

A.B.A. officials maintained close contact with the attorney general and others in the executive branch and members of Congress in discussing the possibility of replacing L.E.A.A.'s National Institute of Law Enforcement and Criminal Justice with a National Institute of Justice covering both civil and criminal matters, along the lines of the A.B.A. proposal.

In June the Department of Justice published a report of a task force assigned to review L.E.A.A. activities. A consolidated statement of the views of the Association on the task force report was developed and presented to the attorney general.

Attorneys' Fees: At the 1977 midyear meeting, the House of Delegates approved a resolution supporting legislation known as the Public Participation in Federal Agency Proceedings Act, which would authorize federal agencies to encourage participation by individuals and groups in agency proceedings by reimbursing them for costs of participation, including attorneys' fees. Parties would be eligible if they represented an important viewpoint that otherwise would not be presented and if they lacked adequate financial resources.

A.B.A. views on the legislation were submitted to Congress by John M. Ferren, chairman of the Committee on Public Interest Practice.

Special Prosecutor: Legislation providing a mechanism for appointment of a temporary special prosecutor and other provisions for ensuring the integrity of

A.B.A. representatives Herbert Hoffman (left) and Robert Kutak supporting federal pay raises before House subcommittee.

Llewelyn Pritchard (right) of A.B.A. giving testimony supporting the Legal Services Corporation.

federal officers moved forward in Congress in a form generally consistent with proposals of the A.B.A. Based on the report of the Committee to Study Federal Law Enforcement Agencies, the House of Delegates endorsed legislation that was included in a bill known as the Watergate Reform Act. The Senate in June approved special prosecutor legislation patterned on the A.B.A. proposal, and the House may do so in the fall of this year.

Prepaid Legal Services: The A.B.A. joined efforts with state and local bars during the close of the 94th Congress to secure tax exemptions for prepaid legal services plans. Congress provided for them in the Tax Reform Act signed by President Ford in October, 1976. The act exempts from taxation employer contributions to and employee benefits from employer-funded group prepaid legal services plans. It also reforms estate and gift tax law.

Federal No-Fault Automobile Insurance: The no-fault auto insurance idea is again very much alive in Congress. Although the 94th Congress failed to move no-fault legislation, the endorsement of the current administration buoyed the hopes of no-fault supporters in the 95th Congress. The A.B.A. continued to work with state and local bars in expressing organized bar concerns about mandatory federal no-fault standards. In July President Stanley's statement stressed that, "The American Bar Association believes that reform of the automobile accident reparations system should continue at the state level, where the unique needs of each state's populace can best be met."

Access to Justice: Strong support for new dispute resolution mechanisms, additional judgeships, and a multitude of other devices that would increase access to justice was expressed by the A.B.A. to Congress in July, 1977.

Judge Shirley Hufstedler of the U.S. Court of Appeals for the Ninth Circuit and Benjamin L. Zelenko, chairman-designate of the Committee on Coordination of Federal Judicial Improvements, presented testimony during a hearing of the House Judiciary Subcommittee on Courts, Civil Liberties, and the Administration of Justice. Zelenko outlined the A.B.A.'s efforts in legislation concerning access to justice, access to legal services, and improvements in the quality of justice and legal services. Most of the legislation he mentioned is pending before the subcommittee.

This legislation includes proposals to (1) establish a national court of appeals; (2) abolish or modify diversity jurisdiction; (3) expand the jurisdiction of federal magistrates; (4) establish a council on judicial tenure; (5) improve class action procedures; (6) award attorneys' fees and litigation costs to prevailing defendants in civil actions in which the United States is a plaintiff and in criminal cases; and (7) authorize the attorney general to initiate actions to protect constitutional rights of institutionalized persons.

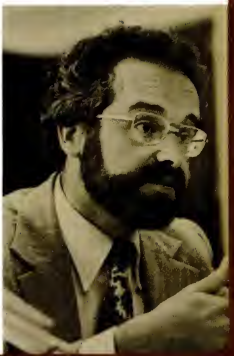
Bankruptcy: Bankruptcy reform made progress in the House during the first session of the 95th Congress. The House Judiciary Committee approved a complex bankruptcy law reform bill, H.R. 8200.

It would establish separate bankruptcy courts, headed by bankruptcy judges elevated to Article III status to rank equally with federal district court judges. The court would handle all bankruptcy cases under new rules provided by the bill.

President Stanley appointed a six-member task force on revision of bankruptcy laws, headed by Board of Governors member L. Stanley Chauvin, Jr., to solicit views of all interested A.B.A. components.

Above: Livingston Hall supporting speciel prosecutor legislation before House Judiciary subcommittee.

Below: A.B.A. support of legislation to protect rights of institutionalized is voiced by Charles Halpern.



A.B.A. Financial Report

CONSOLIDATED REPORT OF BUDGET OPERATIONS FOR THE FISCAL YEAR ENDED JUNE 30, 1977

	1976-77 BUDGET	ACTUAL JUNE 30, 1977	% OF BUDGET	OPERATING FUND	ANNUAL MEETING FUND	JOURNAL	SECTION & DIVISION FUND
REVENUES							
Dues	$14,816,118	$14,821,827	100%	$11,553,633	$	$ 496,760	$2,741,874
Annual Meeting Fees	701,700	811,981	116	-0-	624,801		187,180
Advertising	1,151,350	1,252,879	109	-0-		1,150,523	
Service Fees - FPE	-0-	-0-		765,211			
Investment	751,982	769,331	102	566,164			95,048
Grants and Contributions	7,000,000	7,080,757	101	-0-			
Publications	902,315	1,113,212	123	-0-		34,563	906,340
Other	2,603,377	3,143,769	122	108,515	16,177		
TOTAL REVENUES	$27,926,842	$28,993,756	104%	$12,993,523	$640,978	$1,681,846	$3,930,442
EXPENDITURES							
Governing Groups	$ 935,848	$ 863,471	92%	$ 582,167	$276,164	$	$
Officers & Executive Management	1,828,484	1,891,796	103	1,569,795	64,822		
Communications	3,000,362	2,971,834	99	1,208,097	50,184	1,579,199	
Professional Relations & Standards	1,176,407	1,112,762	95	744,754	173,816		14,225
Program Groups							
Governmental Relations	772,874	700,285	91	693,309	2,462		
Judicial Service Activities	2,117,152	2,143,367	101	478,275	5,655		93,886
Professional Service Activities	6,955,106	7,160,467	103	1,016,938	17,836		4,198,587
Public Service Activities	5,312,906	4,606,503	87	667,042	8,029		47,967
Professional Education	1,487,290	1,468,025	99	188,896	2,078		
Administration & Finance	3,358,203	3,256,461	97	2,370,515	61,194		
Accrued Vacation Expense	-0-	300,000		300,000			
Space Occupancy	575,000	569,526	99	569,526			
Additional Space	47,000	42,875	91	42,875			
American Bar Foundation Research	101,500	101,500	100	101,500			
FPE Contributions & Grants	-0-	-0-		906,112			
Presidential Debates	20,000	20,000	100	20,000			
TOTAL EXPENDITURES	$27,688,132	$27,208,872	98%	$11,459,801	$662,240	$1,579,199	$4,354,665
Excess (Deficiency) of Revenue Over Expenditures:							
Operating Fund	$ 1,227,770	$ 1,533,722		$ 1,533,722	$	$	$
Annual Meeting Fund	(97,020)	(21,262)			(21,262)		
Journal	43,318	102,647				102,647	
Section & Division Funds	(734,439)	(424,223)					(424,223)
Special Funds	315,312	729,536					
Fund for Public Education	(516,231)	(135,536)					
Inter-Fund Transfers	(1,348,652)	(1,103,760)		(1,313,572)	2,380	(214,176)	869,021
Investment Gains or (Losses)	-0-	3,810		3,849			
Net Increase (Decrease) in Fund Balances	$(1,109,942)	684,934		223,999	(18,882)	(111,529)	444,798
Fund Balances at July 1, 1976		6,161,082		725,284	209,510	293,980	1,744,869
Fund Balances at June 30, 1977		$ 6,846,016		$ 949,283	$190,628	$ 182,451	$2,189,667
General Fund Reserves		2,263,985					
		$ 9,110,001					

Association Funds

The A.B.A. has grown to such size and proportion that it now has a financial make-up similar to that of a large corporation. In fiscal 1976–77 the consolidated operating budget exceeded $27.5 million and assets totaled more than $17 million. The Association has a number of separate funds; the largest of these is the operating fund, which had revenues of nearly $14 million for 1976–77. Other funds include the annual meeting fund, the *A.B.A. Journal* fund, the Fund for Public Education (F.P.E.), section and division funds, and the special funds.

The operating fund has an annual budget of approximately $13 million. This fund includes the operating budgets for a vast number of activities of the Association and provides funding for numerous costs associated with the A.B.A.'s program support, including those for staff and facilities. The major source of operating fund revenues is, of course, membership dues, although additional revenue is provided from investment income, F.P.E. service fees, and other miscellaneous sources.

The annual meeting fund is the working fund for the annual meetings of the Association. The balance at any given time is the net of direct revenues of prior annual meetings less direct costs for those meetings. This balance serves as a reserve for future meetings. The balance at the close of the 1976–77 fiscal year was approximately $200,000.

The *A.B.A. Journal* fund is the working account for the *A.B.A. Journal*. The sources of revenues are the yearly allocation from membership dues at the rate of $3.00 per member (effective fiscal 1977–78) and the *Journal*'s advertising revenue. The *Journal*'s annual budget is approximately $1.6 million.

The Association has separate funds for each of its twenty-three sections and divisions. Annual budgeted revenues for those funds, derived primarily from section dues and investment income, are approximately $3 million.

The A.B.A. has a number of what are termed special funds, which are primarily special revenue funds. The largest of these, the building operating fund, is maintained by the A.B.A. as the agent for the American Bar Center. The special funds also include the Erskine M. Ross fund, the Henry C. Morris fund, the advertising development fund, and the national institutes–continuing legal education fund.

PECIAL FUNDS	FUND FOR PUBLIC EDUCATION	INTER ORGANIZATION TRANSFERS
29,560	$	$
102,356		(765,211)
11,783	96,336	
172,309	7,986,869	(906,112)
,155,794	863,283	
,471,802	$8,946,488	$(1,671,323)
5,140	$	$
	287,656	(30,477)
39,654	121,520	(26,820)
47,021	152,768	(19,822)
4,514		
	1,649,102	(83,551)
18,734	2,128,843	(220,471)
62,980	4,148,491	(328,006)
844,370	488,745	(56,064)
719,853	104,899	
		(906,112)
,742,266	$9,082,024	$(1,671,323)
	$	
729,536		
	(135,536)	
(447,413)		
(39)		
282,084	(135,536	
617,869	2,569,570	
899,953	$2,434,034	

General Information

Appropriations from the operating fund are made on a fiscal year basis by the Board of Governors on recommendation of the Finance Committee. Requests for emergency or supplemental appropriations during the course of the fiscal year are submitted to the Finance Committee in the same manner as requests for regular budget appropriations.

The Association's fiscal year is undergoing a change from a July 1–June 30 year to a September 1–August 31 year. This is effective with the 1977–78 fiscal year. To provide for the changeover that fiscal year will also include a two-month transition period and will, in effect, be a fourteen month "year."

Detailed financial statements are provided on a monthly basis for each of the sections, committees, and staff departments. Sections have traditionally accumulated and maintained reserve funds that are carried from year to year. Section reserve funds are primarily used for special projects of a section or for other undertakings that could not otherwise be financed from section income. The amount of a section's reserve fund is shown on the monthly financial statements.

In 1976–77 revenues were derived from three major sources: (1) general dues, which provided approximately 42 per cent of revenue dollars; (2) grants and contributions providing approximately 24 per cent; and (3) a combination of section dues, investment income, publications, meetings and seminars, and miscellaneous sources, which provided the remaining 34 per cent. Recent developments in the staffing and activities of the Office of the Fund for Public Education should play a major role in increasing the financial resources that support the numerous law-related public service activities of the Association.

Financial Program Support

The myriad professional and public service activities of the Association, sponsored by the standing and special committees, sections, commissions, and task forces, receive financial support from a variety of sources. The operating fund provides for the staff support for all of those entities and also funds the basic support costs of all but the sections. In addition, many of the numerous American Bar Association programs generated by those groups receive financial support from the operating fund. Of the total resources available for fiscal 1976–77, more than 55 per cent were allocated to programs or projects relating to improvement of professional services and competence or matters of professional concerns. Examples of these projects and programs include those dealing with professional education, the delivery of legal services, lawyer referral, malpractice, and lawyer advertising.

An additional 20 per cent of the total resources is spent on public service oriented projects and programs through both direct and indirect support. Those projects frequently qualify as Section 501(c)3 of the Internal Revenue Code tax-exempt activities and receive much

of their support from outside funding sources through the A.B.A.'s Fund for Public Education.

Fund for Public Education

The Fund for Public Education is the entity of the American Bar Association that solicits and accepts grants and gifts in support of law-related educational and charitable public service activities of the profession. It was created in 1961 as a means by which the A.B.A. could broaden its public service role. Since then the A.B.A. has enlarged the range of its program activities to new areas of public and professional concern, such as medical professional liability; correctional facilities and services; economic regulatory reform; legal representation of the mentally disabled; legal service for low- and middle-income Americans; law-related education for school students; and continuing legal education for lawyers and judges.

The fiscal year ending June 30, 1977, marked the sixteenth year of law-related public service work conducted through the Fund for Public Education. During the year more than seventy separate projects operated, with receipts totaling close to nine million dollars.

The F.P.E. has five funding categories: (1) public and professional issues of broad national importance; (2) access to legal justice and services; (3) educational projects for the profession and the public; (4) development of model codes and other legal standards; and (5) traditional professional activities.

A number of projects to which the F.P.E. made important contributions are described elsewhere in this report, including Law Day, specialization, minor disputes resolution, prepaid legal service, and the A.B.A. Caravan meetings with state and local bar associations.

A sampling of the F.P.E.'s projects in just one category—public and professional issues of broad national importance—follows.

Corrections: Programs sponsored by A.B.A. entities have sought to establish a firm linkage between the practitioner and the criminal justice system. The most far reaching to date has been the Commission on Correctional Facilities and Services, which was the first of several interdisciplinary groups created by the Association to deal with growing social and economic problems impinging directly on the role of the lawyer in our society. Commissions are unique creations in that they are created when an issue requires a perspective the profession alone cannot provide. The Corrections Commission is composed not only of lawyers and judges but also includes physicians, administrators, and corrections experts.

During its eight years of operation, the commission has received liberal funding support of more than eight million dollars from private and public sources, enabling it to engage in a wide range of activities related to improving prison services and facilities.

Mental Health: The field of mental health law and legal representation of the mentally disabled had long been a neglected area of professional involvement before the American Bar Association created the Commission on the Mentally Disabled in 1974 to broaden and facilitate access to information on the subject. During the past three years the commission has established a Mental Disability Legal Resource Center to provide clearinghouse services for mental health law materials and a *Mental Disability Law Reporter* to provide lawyers and others in the field with a resource tool on the most recent developments in the law. In addition to its clearinghouse activities, the commission has sponsored programs to broaden mental patients' access to legal services.

Medical Malpractice: In 1975 the A.B.A. authorized the creation of the Commission on Medical Professional Liability, yet another interdisciplinary group, to examine comprehensively the subject of medical malpractice, particularly the processing of claims and the payment of just compensation.

Expenditures

Improving Professional Competence — 25¢

Improving Professional Services — 25¢

A.B.A. Members Communications — 13¢

Policy Making — 12¢

Professional Concerns — 5¢

Public Service Activities — 20¢

ASSETS

Cash

Securities
- Investment Fund
- Short Term Investments

Collateral Deposit, Fund for Legal Education Program

Accounts Receivable
- Due from Affiliated Organizations
- Due from General Fund
- Due from Development Fund
- Other

Notes Receivable

Student Receivable Less Allowance Of $220,000 for Doubtful Loans

Prepaid Annual Meeting Expenses
Prepaid Expenses

LIABILITIES & FUND BALANCES

Accounts Payable & Accrued Expenses
- Due to Affiliated Organizations
- Due to Grant Funds
- Due to Section Funds
- Due to Special Funds
- Outstanding Encumbrances & Commitments
- Other

Deferred Annual Meeting Fees
Deferred Washington Office Rent
Deferred Income

Fund Balances

General Fund Reserves

During the last two years the commission, which is composed of persons from government, the medical, insurance, and legal professions, and experts in arbitration, screening mechanisms, and consumer health needs, has worked diligently to produce recommendations that would establish effective and permanent solutions to this ever-growing crisis. With substantial public and private financing, the commission has issued major interim reports on such issues as the prevention of medically-related injuries in hospitals, techniques for ensuring the availability of insurance, and mechanisms for resolving disputes as to medical liability.

Sources of Revenue

CONSOLIDATED BALANCE SHEET
JUNE 30, 1977

		AMERICAN BAR ASSOCIATION			FUND FOR PUBLIC EDUCATION	
COMBINED	ELIMINATIONS	GENERAL FUND	SECTION FUNDS	SPECIAL FUNDS	DEVELOPMENT FUND	GRANT FUNDS
$ 719,593	$	$ 459,437	$ 2,080	$	$ 90,534	$ 167,542
4,936,031		3,912,775	852,535	160,721		10,000
15,101,907		11,907,207	834,700	10,000	2,350,000	
31,023		-0-			31,023	
69,382	170,149	239,531				
-0-	3,410,658	-0-	2,658,251	752,407		
-0-	1,626,473	-0-				1,626,473
667,165		289,439	2,490	3,043	267,664	104,529
24,800		24,800				
4,325		-0-			4,325	
190,973		151,874	39,099			
417,521		397,619	19,902			
$22,162,720	$ 5,207,280	$17,382,682	$ 4,409,057	$ 926,171	$ 2,743,546	$ 1,908,544
$ -0-	$ 170,149	$	$	$	$ 170,149	$
-0-	1,626,473				1,626,473	
-0-	2,658,251	2,658,251				
-0-	752,407	752,407				
531,445		265,738	99,661	8,437		157,609
920,188		679,057			231,067	10,064
644,216		631,188	13,028			
54,976		54,976				
10,901,894		8,754,718	2,106,701	17,781		22,694
6,846,016		1,322,362	2,189,667	899,953	715,857	1,718,177
2,263,985		2,263,985				
$22,162,720	$ 5,207,280	$17,382,682	$ 4,409,057	$ 926,171	$ 2,743,546	$ 1,908,544

A.B.A. President Previews Association's 100th Year

William B. Spann, Jr., of Atlanta became president of the American Bar Association at the conclusion of the 1977 annual meeting in Chicago. A leader in organized bar activities for forty years, Mr. Spann served as chairman of the House of Delegates in 1970–72. He has been a member of the House since 1954 as a representative from his home state of Georgia. He received an undergraduate degree from Emory University and his law degree from Harvard University.

I am particularly honored at being chosen to serve as president of the Association during our centennial year. Centennials are important milestones in the history of any organization because they encourage the membership to sit with a Janus face and view the past accomplishments and the future aspirations of the organization. I hope that 1977–78 will be a year of both celebration for past accomplishments and the commencement of new initiatives in many important areas of the administration of justice.

One hundred years ago seventy-five lawyers, judges, and law teachers met in the courtroom of the townhall in Saratoga Springs, New York, to establish the A.B.A. as the first permanent national bar association. Today's 220,000 members are their professional descendants. In June, 1978, the Board of Governors will pay tribute to these seventy-five charter members at a special ceremony in Saratoga Springs. At that time a commemorative edition concerning the founding of the Association, *A Good Day at Saratoga*, by Gerald Carson, will be issued. Other important aspects of the Association's history and programs will be covered in special features in the *American Bar Association Journal* throughout the year, as well as in a special centennial issue that will highlight the history and direction of the Association.

Work has already begun on the production of a special half-hour movie, *The Lawyer in America*. It is my hope that this film will spotlight the unique role of our profession in the development of our nation in the past, present, and future. We are certain that this movie will be of such high quality that state and local bar associations will use it and that television stations throughout the nation will show it. In a sense it will be a gift from the legal profession to the nation in our centennial year.

The crown jewel of the centennial celebrations will be the 1978 meeting in New York. At that time the movie will premiere, and the meeting will feature special programs in every area of the law commemorating past achievement and future promise. I sincerely hope that you and the members of your family will make your plans now to attend.

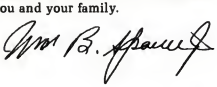
The centennial year also will mark the beginning of and the continuation of many policy objectives of the Association. At the 1977 midyear meeting in Seattle, the House of Delegates committed the Association to participate in a symposium on the Code of Professional Responsibility. This symposium will be held at the 1979 annual meeting in Dallas on the tenth anniversary of the adoption of the present code. To prepare for that event, I have received approval from the Board of Governors to create a special committee to review the present code. This special committee, chaired by Bob Kutak of Omaha, Nebraska, will consider changing the form of the code so that it may have more utility to the lawyer who encounters ethical dilemmas in his practice. The committee will also examine new areas of ethical problems and provide proposed solutions. In our centennial year we will be working to end the confusion about what is right and what is wrong in the practice of law.

This year I intend to continue the A.B.A.'s leadership in finding new ways to improve the delivery of legal services. I hope to find a satisfactory answer to the question of lawyer advertising. Work will continue on all other aspects of the delivery of legal services issues through the work of the Consortium on Legal Services and the Public. The consortium will host a national conference on the delivery of legal services in December, 1977, in New Orleans. This conference and any recommendations that may come from it will be at the top of my presidential priorities.

The coming year also offers the possibility of exploring new dimensions in law and education. The Board of Governors has authorized the creation of an interim task force to plan a program for college undergraduates on the interface between law and the humanities. I anticipate full funding for the program very soon, at which time an interdisciplinary commission will be formed to oversee the program.

As you can see, 1977–78 will be a vital and important year in the development of our Association. There is no time when your membership in the American Bar Association will be more necessary.

I also hope that the coming year is a happy, healthy, and productive year for you and your family.



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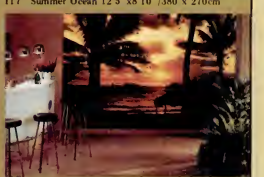

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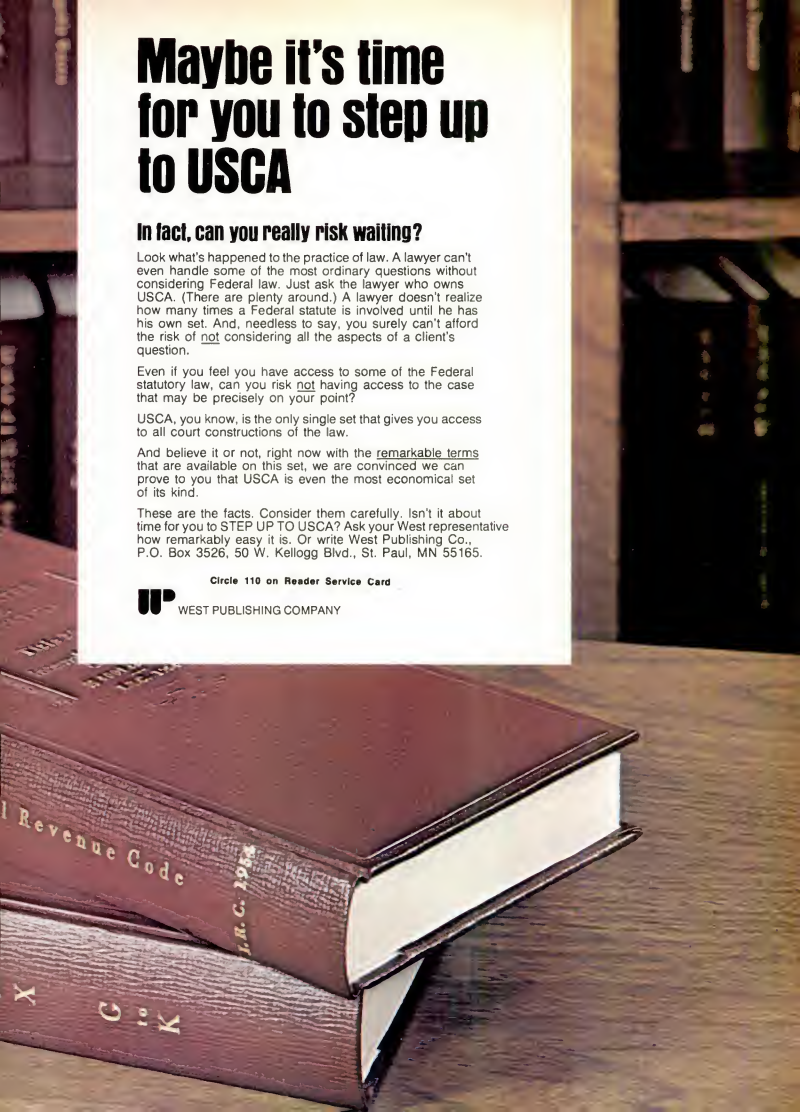


THE LAW IN SPACE AGE YEAR

Space Shuttle Orbiter "Enterprise"

Story photography courtesy of the National Aeronautics and Space Administration

By Rowland L. Young

ON OCTOBER 4, 1957, twenty years ago as we measure time on earth, scientists and engineers of the Soviet Union launched a rocket that settled into orbit some five hundred miles above the planet. Sputnik I, the earth's first artificial satellite, weighed 184 pounds and circled the globe in a hundred minutes. It changed forever man's concept of himself, and its launching was the beginning of a new age.

For perhaps a million years—not even the blink of an eye in the long existence of the universe—the creature that calls itself man has crawled the surface of a small, slightly egg-shaped ball of rocks and other debris that revolves in an elliptical orbit around a minor star far from the center of the universe. How far we cannot even imagine, for our notion of distance is limited by our three-dimensional measurements of the tiny rock on which we were born. In the immensity of the universe, a mile shrinks to infinitesimal, concepts like up and *down* cease to have meaning, and the idea of distance itself changes and becomes one with time. The universal distances are so great that we express them in terms of the speed of light, a speed so swift that most of us cannot comprehend it.

The launching of Sputnik I was the first step in the realization of a dream that men have entertained since the beginning of the race. All generations of mankind have stared into the heavens and speculated about the mysterious lights in the sky that are so familiar and yet so unapproachable. The sun and the moon have been worshipped as deities, and generations have believed that the stars control our destinies. Man has walked the earth perhaps a million years, but it is only in the past three centuries that the true nature of the sun and the other stars has been understood. We know far more today than any generation that has gone before, but our knowledge, far from solving, has only deepened the mystery of the universe.

It is easier to conceive of a star as a remote god than to comprehend its true nature. The wildest imaginings of our ancestors who speculated about the heavens are surpassed in wonder by the truth. We have only begun to understand our own star, the sun. The past two decades are prologue.

Sputnik I was followed a month later by Sputnik II, and less than two months later, on January 31, 1958, the United States became a space power when it launched Explorer I. The Sputniki and Explorer I were followed by the thousands of artificial satellites that

Skylab Space Station

Space shuttle "Enterprise" recovering satellite for repairs

have been placed in orbit around the globe. They have many purposes. Some of them measure natural phenomena, such as magnetic fields, cosmic rays, and solar winds. Some are used by cartographers to improve the accuracy of charts and maps of the surface of the earth. Satellites scan cloud patterns and make it possible to warn of approaching hurricanes. Eventually they may make it possible for weather forecasting to be an exact science. Satellites are used to take photographs of the earth's surface that can be used to locate likely sites for finding oil and other minerals. Infrared photographs taken from satellites can identify the existence and spread of agricultural pests and determine what areas are suitable for cultivation. There are, of course, a number of military uses of satellites, and the communications satellites have made possible a $2 billion industry and have cut the cost of a telephone call from New York to London almost in half.

For the near future the greatest benefits mankind may expect from its ventures into space appear to be those that will come from the use of artificial satellites, but far more exciting is the prospect of space exploration. Probably the most spectacular event of the twentieth century occurred on July 20, 1969, when Astronaut Neil Armstrong set foot on the surface of the moon, "A small step for a man, a giant leap for mankind." Both the United States and the Soviet Union have programs to explore outer space whose ramifications shake the mind.

The only event in history comparable to man's venture into space is the discovery of America. When Columbus landed in the West Indies, he took possession of the New World in the name of Spain, and for the next three hundred years Spain, Portugal, England, France, and—to a lesser extent—the Netherlands expended millions of dollars and thousands of lives trying to build empires in the Western Hemisphere. Their rivalry produced three centuries of strife, partly for possession of territory to which they had a legal right only because there was no one to challenge that right.

So far there has been no similar contest in space, in spite of the intense rivalry between the Americans and the Soviets and the huge outlay each has made for its space program. The Sputniki and the Explorers obviously violated the territory of every state over which they flew, according to the old theory that sovereignty extends "to the heavens." No one registered a protest, perhaps because of the realization that it is meaningless to talk about the air space "above" an area on the surface of a spinning globe if you have the point of

Astronaut Edward H. White on extravehicular activity while in orbit

view of the commander of a spaceship approaching the globe from hundreds of thousands of miles in outer space.

However, the fact that no country has objected to the presence of artificial satellites over its territory does not mean that there is no legal problem. Obviously a flight five hundred miles above the earth is one thing, and one five miles above another. If the nations of the earth have tacitly agreed that artificial satellites in orbit "in space" around the earth are not subject to the old notions of sovereignty, the problem remains just how far from the earth must a satellite be in order to be considered "in space." In short, how are the boundaries of outer space to be defined? So far there has been no agreement.

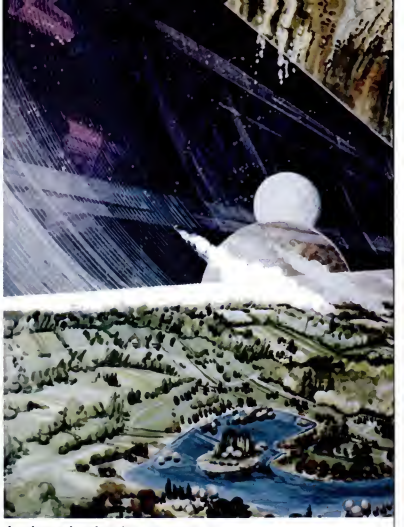
This is only one of the many legal problems that man's venture into space has raised.

Some of the proposed uses of satellites envision large numbers of workers living more or less indefinitely in a satellite orbiting above the earth, and, while the suggestions of colonies on Mars, or even on the moon, may sound like science fiction, it is hard to rule out the possibility that technology may make this possible in the lives of our children.

The legal problem has not been ignored. As early as 1958 the United Nations took up the problem of law for outer space. The discussions in the General Assembly indicated a consensus on three major points: outer space was to be used for peaceful purposes only, the general principles of law recognized by all civilized nations applied to outer space, and space was not subject to the extension of national sovereignty. On December 13 an *ad hoc* committee was formed to consider general legal and technical problems. It reported in June, 1959, recommending that no attempt be made then to promulgate a comprehensive legal code. On December 12, 1959, the *ad hoc* committee became the twenty-four member permanent Committee on the Peaceful Uses of Outer Space.

In spite of difficulties caused by the cold war, the committee managed to achieve limited agreements in 1962 and 1963 on some technical points. In 1963 there was a thaw in the cold war, and with agreement by the United States and the Soviet Union, the General Assembly adopted a nine-point Declaration of Legal Principles Governing the Activities Of States in the Exploration and Use of Outer Space. That declaration was the basis for the Outer Space Treaty, which was finally signed by sixty-three nations on January 27, 1967. The full name is "Treaty on Principles Governing the Ac-

Exterior of model space colony



Landscape interior of a self-contained 21st century space colony

tivities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies."

In general, the treaty provides that space shall be free for the exploration by all nations, that the moon and other celestial bodies are "not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." It also prohibits placing weapons of mass destruction in outer space or establishing military bases there and places international responsibility on nations for their space activities.

Obviously the treaty is not and was not intended to be a comprehensive code of law for outer space.

The questions that remain are hard.

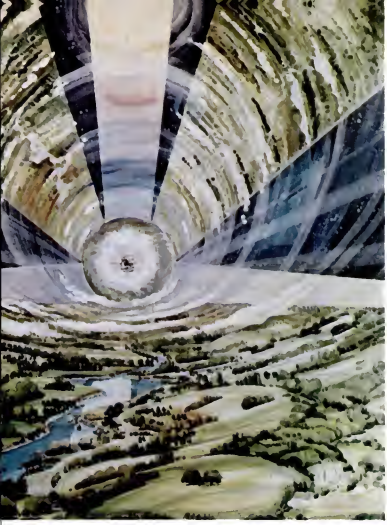
The space shuttle is now a fact, but there are many formidable legal problems that must be resolved before it can be used commercially. Shall it be developed by government or by private corporations? There are problems of flight insurance and protection of patent rights. Space corridors will have to be set up, just as air corridors have been established for airplanes. Outer space is tremendous, but the space around the earth is already cluttered with hundreds of artificial satellites launched by half a dozen nations.

So far the greatest use of space satellites has been in the field of communications. A number of satellites are already receiving signals from one portion of the earth and beaming them back to another. The problems here are similar to those of the use of radio waves, except that they are exacerbated by the nature of satellites. Some locations in space are better than others for communications, and there is the question of who ultimately controls them.

There are other possible uses of satellites that raise legal questions. It has been suggested that satellites be used to collect solar energy for transmission to earth, where it would be converted to electrical power that could be transmitted to consumers by conventional means. It would also be possible to launch satellites that would in effect be space factories, with a number of workers, and that would take advantage of the purity of space and the lack of weight to manufacture "exotic materials," which would include biological and electronic products.

Since the Outer Space Treaty prohibits sovereignty in outer space, and since it is obvious that a number of people living together in outer space, whether that be a satellite orbiting five hundred miles above the earth or a colony on Mars, will have the problems that all human beings encounter when they live together, the question of jurisdiction arises. Inevitably crimes will be committed, and people will want to sue for redress of grievances, either in tort or contract. Where shall these legal cases be heard?

There is a similar problem in Antarctica, where an



international treaty forbids assertion of sovereignty. The answer may come from there, for it seems likely that it will arise there sooner.

There is also the problem of the citizenship of children born in a future space colony in orbit or on the moon. At least so far as American law is applicable, our present provisions about children of American parents born abroad would apply, but nevertheless some interesting, and by no means easy, questions of citizenship are raised. There are others, such as the question of inheritance of the property of decedents in a space or moon colony and who is liable for injuries caused by debris from a satellite that falls to earth.

The real test of the Outer Space Treaty and its provision that nations may not appropriate celestial bodies for themselves awaits the discovery somewhere in outer space, most probably the moon or Mars, of valuable minerals or other resources that can be exploited economically. Even if the discovery is made by a nation willing to abide by the spirit as well as the letter of the agreement that resources of outer space are to be used to benefit all mankind, a treaty, even enforced by the United Nations sanction, is a frail thing as the treaties between the United States and the American Indians demonstrate.

It seems only rational that the many problems of space law be resolved—and soon—by international treaty, but the prospects of that are not bright, given the vast differences that divide mankind, and in this case particularly the United States and the Soviet Union, the world's leading space nations. But in another sense it may be presumptuous for the human race to promulgate space law. Given the vastness of the universe, most scientists now believe that the earth is not the only place in the universe capable of producing life, and if there is life beyond the confines of earth, the possibility of intelligent life cannot be ruled out.

If the scientists are right, and the odds seem to be in their favor, the human race sooner or later will face a confrontation with totally alien creatures.

The ramifications, legal and otherwise, are both exciting and frightening. Will they be friendly or hostile? Or, perhaps worse, will they be indifferent? Our ideas of law deal with human rights, not rights of animals or plants or rocks, but what happens to those ideas when we are dealing with intelligent nonhuman beings? Suppose their law regards mankind as a species of lower animal?

This, of course, is the realm of science fiction, not a subject to be seriously considered by lawyers. At least not now.

But until World War II, only thirty years ago, travel to the moon was a dream, not to be seriously considered by scientists and engineers. The problem is that, so far, the scientists and the engineers are making progress far faster than the lawyers.

The Outer Space Treaty was a good beginning. Unfortunately, it seems also to be the end of terrestrial agreement on how mankind shall live in the space age. ▲

First of a five Part Series

Lawyers Who Became President

Story illustrations by Jerry Pressler

By Harry J. Lambeth

Harry J. Lambeth has practiced law in Washington, D.C., since 1954. A Chicagoan and once a newspaperman, he has degrees from the University of Illinois and the Georgetown Law School.

Twenty-three lawyers have become presidents of the United States. This month's installment focuses on two stars of the bar—Benjamin Harrison and John Adams.

ABE LINCOLN would walk into his office about 9 in the morning, pick up a newspaper, spread himself out on an old sofa, begin to read aloud, and drive his partner, Bill Herndon, up the wall.

Cal Coolidge would slip out of his shoes and try to maintain his dignity by hiding his stocking feet in his office wastebasket, but an unannounced woman client once surprised him and turned the usually cool Vermonter red-faced with embarrassment.

Major Bill McKinley was mustered out of the Union army with the problem thousands of latter-day G.I.s faced—no job and no career. But on the advice of a sister, he enrolled in law school.

Rud Hayes slept in his office to hold expenses to thirty dollars a month, "not including clothing."

Frank Roosevelt's witty, handwritten, 1907 an-

nouncement of his first law job set out his talents: "Unpaid bills a specialty. Briefs on the liquor question furnished free to ladies. Small dogs chloroformed without charge."

Gerry Ford, fresh out of Yale Law School in 1941, pocketed his first fee—five dollars for examining an abstract.

The twenty-three lawyers from John Adams to Gerald Ford who attained the presidency of the United States are a microcosm of the thousands of members of the American bar.

Some began their careers in near poverty: Andy Jackson was orphaned at fourteen; Millard Fillmore's tenant-farmer father talked his county-judge landlord into giving his boy a trial as a clerk-apprentice to get Millard out of a mill; poor health gave Jim Polk the education his stronger brothers missed because they were needed on the family farm.

Others were from prominent or well-to-do families. John Quincy Adams's father was vice president; Ben Harrison's great-grandfather was a signer of the Declaration of Independence for Virginia, and his grandfather was the ninth president of the United States; Bill Taft's grandfather and father were judges; and Jim Buchanan's dad was a prominent Mercersburg, Pennsylvania, merchant and landowner.

The lawyer-presidents, like their professional brethren through the decades, spanned the American economic and cultural spectrum. Most had the same successes and disappointments that have confronted all practicing lawyers. A few, like Woodrow Wilson and Franklin Roosevelt, didn't really enjoy law practice and eventually gave it up. Others, for their times, were superlawyers and the leaders of the bar.

Nearly all had a natural second love—politics—and few of those who left their practices for politics and a path to the White House returned to the bar.

People come to lawyers to solve personal problems, as the public comes to politicians for governmental problems. The lawyer is experienced in persuasion, in bargaining, in compromise—the tools of politics. Thus, public office is a constant temptress.

In the early years of the Republic the law, like the times and the government, was simple. There were no major tax problems, bureaucracies, corporate legal departments, alphabetical governmental agencies, big tort claims, expert witnesses, scientific evidence, and headline-making prosecutors. Except for a few prominent colonial lawyers, it was a bar of roughhewn, backwoods lawyers concerned about horse thievery, straying animals feasting on a neighbor's cabbage patch, title and inheritance disputes, slander and libel suits, and the general problems of the small merchant and farmer. Litigation usually was one against one. Law firms were sole or two or three practitioners in walk-up offices above a bank or in ground-level storefronts near the county courthouse.

The industrial revolution of the 1800s changed this. Life and litigation became complicated together. Lawyers shed their folksy ways and homespun clothing for erudite manners and well-tailored suits.

Most of the twenty-three whose careers took them to the White House were successful, if not great, presidents. All were extraordinary men. If not possessed with high intelligence through book learning, they obtained it from a certain shrewdness and determination. While few were leaders of judicial thought, all had the ability to succeed and did. Some were legal scholars, spellbinders before a jury, shrewd politicians, or rough soldier-frontiersmen more familiar with a musket than with Blackstone.

An examination of their careers reveals common threads. Benjamin Harrison and Grover Cleveland were indefatigable workers. The sound judgments of Abraham Lincoln and Calvin Coolidge inspired client confidence. The tremendous intellects of John Adams and Thomas Jefferson ensured leadership. For others, such as the smiling F.D.R. and the good-natured William Howard Taft, it was personality. Supreme Court Justice David Brewer considered the three hundred-pound Big Bill Taft the politest man alive. "I heard recently," he chuckled, "that he arose in a streetcar and gave his seat to three women."

Of the thirty-eight who have been president of the United States, public memory has not been kind to those who are regarded to have been among the most successful lawyers of their time. James Buchanan, Millard Fillmore, Benjamin Harrison, Rutherford Hayes, Franklin Pierce, and Martin Van Buren are not household presidential names. Time and the public have

nearly forgotten them, but they were legal giants. Other great lawyer-presidents—for example, John Adams and Grover Cleveland—while remembered by the public as chief executives, are not usually thought of as having been among the who's who of American lawyers. Yet they were.

While it is hazardous to attempt to select an all-star law firm from the twenty-three, the name on a Wall Street door might read alphabetically: Adams, Cleveland, Harrison, and Van Buren.

A Star of the Bar: Harrison

If there is a number one, it could be Benjamin Harrison, with Martin Van Buren a close second. Harrison's law practice (1854–1901) spanned his adult life with interruptions to serve in the Senate (1881–87) and as the twenty-third president (1889–93). He appeared before the Supreme Court in several cases, and a secretary to Chief Justice Fuller called him "the ablest lawyer to be president."

Harrison possessed all the talents of the superlawyer: brilliant mind, extraordinary memory, unusual power of analysis, and great speaking ability. His almost half-century of practice confirms it.

His first fee was a five-dollar gold piece for riding ten miles of muddy road in 1854 to prosecute a case for obtaining money under false pretenses in an open-air, backyard "courtroom" of a Hoosier J.P. He topped his stellar career nearly fifty years later in an international arbitrational tribunal in Paris as chief counsel for Venezuela in a dispute with Great Britain over the boundary of British Guiana (now Guyana). Two United States Supreme Court justices, two British jurists, and a Russian comprised the tribunal. Harrison refused all work for fifteen months to prepare the case, for which he obtained a $20,000 retainer and $10,000 quarterly until the decision. His final argument ran twenty hours over five days. The Russian member of the panel sided with his British associates in a three-two ruling against Venezuela. Both countries were disappointed, but the case brought fame as an international lawyer to the former president.

Diligent preparation was not unusual for Harrison. In one of his early cases after arriving in Indianapolis, a growing western town in 1854, he was appointed by the city attorney to assist in prosecuting a hotel employee charged with poisoning the coffee of a guest. Young Ben spent ten hours in the office of his doctor boning up on poisons. After an all-day cross-examination, he won a conviction.

Born in North Bend, Ohio, in 1833, he was graduated from Miami University. His father, a justice of the peace, farmer, and later congressman, sent him to Cincinnati for two years in the law office of Bellamy Storer, a former Whig congressman and a prominent attorney. Harrison was admitted to the Ohio bar in 1854, when he was twenty, but he decided on Indianapolis over Cincinnati or Chicago.

In his early days he often encountered distinguished opponents. He once prosecuted a burglary case in which the defendant had retained a former Indiana governor, David Wallace. Harrison won the case, and it brought him into association with the Wallace family. A year later Ben and Wallace's son, William, a well-known Indianapolis lawyer, established a partnership. Three years later the 1857 Indianapolis city directory carried an advertisement for "Wallace & Harrison, Attorneys at Law," noting "Special Attention given to Collections," with B. Harrison identified as a notary public and commissioner for the court of claims.

From 1855 to 1860 the firm prospered, being retained by out-of-state lawyers for collection work and divorce cases. At that time Indiana was an early-day Nevada. Harrison was elected city attorney in 1857 and began a political path to the White House.

Defeated in his bid for re-election in 1892 by Grover

Cleveland, President Harrison returned to his law practice and let it be known that his minimum retainer was $500 and court appearances would be limited to very important cases. They came! He said he did not want to be "under the spur" in his postpresidential practice.

He delivered a series of six law lectures at Stanford University in 1894 for $25,000. His income was running about $50,000 a year, and he was trying important cases in Chicago, Indianapolis, and before the United States Supreme Court. One was a five-month will contest in Richmond, Indiana, in 1895 that netted him a victory for his clients and a $25,000 fee.

The next year he was elected the first president of the Indiana State Bar Association and was regarded as one of the best speakers of the day.

Only three past presidents are believed to have appeared as counsel before the Supreme Court—John Quincy Adams, Cleveland, and Harrison. Harrison's last appearance before the Court was as associate counsel for a New York law firm, challenging the constitutionality of the Illinois inheritance tax, for which he billed a fee of $5,000.

He died at sixty-seven on March 13, 1901, in his Indianapolis home on Delaware Street, now one of Indiana's best known shrines.

Adams: A Busy Boston Lawyer

John Adams was one of the ablest of colonial lawyers. His career, however, was shaded from public view for more than a century until he was "discovered" by television for the bicentennial. For Adams, the "Atlas of Independence," fame, as for most who reach the pinnacle of their profession, did not come overnight.

For many of his eighteen or so years of law practice he endured the drudgery of riding the rutted and muddy roads of the circuit with its uncomfortable rural inns and mediocre meals. He told his diary: "What plan of reading or reflection or business can be pursued by a man who is now at Pownalborough, then at Martha's Vineyard, next at Boston, then at Taunton, presently at Barnstable, then at Concord, now at Salem, then at Cambridge and afterwards at Worcester. . . . What a dissipation must this be?"

Generally the cases along the circuit equaled the discomforts of the trip. They ran the gamut from debt to trespass to assault to theft. Once in Salem the future president found himself representing a defendant in a fight that started from a fancied personal insult. When an apology was demanded, the defendant replied: "I ask your pardon, you chuckle-headed s.o.b?" With that, the fight began. Adams got him off.

By about 1770, a dozen years after admission to the Boston bar, Adams, then thirty-five, noted his legal progress—not so much in the volume of cases but in their quality and important clients and larger fees.

By the time he gave up his practice for public service, he had won the reputation of being the best defense lawyer in Massachusetts. Fame, if not fortune, came to

him because of his successful defenses of American seamen charged with the murder of a British naval officer who boarded their vessel to impress them into the British navy and the defense of Captain Preston and his squad of eight English soliders in the Boston Massacre. One civil case—defending John Hancock's sloop *Liberty* in a customs case—became a *cause célèbre*. It brought an offer from the crown to serve as king's advocate of the Admiralty Court, which Adams declined. His representation of the major fish importers of the colony also contributed to his legal prominence.

Adams moved on to public office and eventually the presidency. When his term ended in 1801, he did not return to law. He died twenty-five years later at ninety on July 4, 1826, the fiftieth anniversary of the Declaration of Independence. ▲

Books for Lawyers

BENEATH THE BADGE. By Herbert and Allan Beigel. Harper and Row, 10 East Fifty-third Street, New York, New York 10022. 1977. $12.95. Pages 277. *Reviewed by John P. Frank of the Arizona bar (Phoenix).*

Between 1970 and 1976, seventy Chicago police officers, after lengthy investigation, were tried for corruption. Nine were acquitted. The guilty included the No. 4 man in the department.

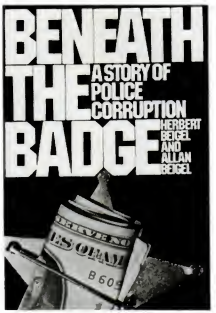
No one supposes that the prosecutors found all the guilty. These convictions came out of only three districts; there was not energy or will to examine the others. The total take was large, the individual payments usually small. These were only the tavern and gambling tolls; there were carefully structured shares in the "packages" picked up by the police in their official vehicles as they performed their unofficial duties.

This book is about that investigation, those trials. Herbert Beigel, now a Chicago lawyer, was with the Department of Justice strike force when the investigation began. His brother, coauthor psychiatrist Allan Beigel, who had worked with law enforcement officials on police corruption, was not a participant. However, together they bring knowledge, judgment, and the best sort of journalistic skill to the collaboration.

The result is a book that every lawyer, lawyer's spouse, and children from high school age up ought to read. The story moves with the zip of a good mystery novel; it's a Perry Mason with Mason as prosecutor for a change. There are, of course, mystery, suspense, doubt, and character, good and bad. There is also simplicity. It's not very complicated to tell twenty or thirty tavern keepers that if they don't join a club and kick in $250 a month, they'll lose their licenses, and if they complain, there will be a fire, or a riot. On the gambling, if any one crosses the syndicate, he could wake up dead.

The only trouble is that the good guys–bad guys flare of the story could keep one from realizing what it's all about. What it's about at a second level is:

- A great city in fear of shakedown by its own servants.



- An Internal Revenue Service that won't help investigate palpable income tax evasions, forcing the use of only marginally relevant federal criminal statutes.
- A Federal Bureau of Investigation that can't be bothered.
- A condition that had existed for years and would continue to this day if a handful of Department of Justice lawyers had not persisted, and persisted, and persisted. No one will ever know how many retired Chicago police officers with bulging bellies and well-padded pocketbooks have rolled off to retirement as heads of village police forces. An example is vice co-ordinator and unindicted coconspirator Frank Bychowski, who turned state's evidence. But for this investigation, it would be happening still. (Maybe it is).

There is a third level, most important of all, that goes beyond the story and the obstacles to uncovering the crimes. That third level is the cure for conditions that create this kind of police force, this kind of law enforcement system.

The Beigels do not accept the ready answer that corruption is a necessary by-product of victimless crimes. This may be so, but substitute regulation for prohibition and a whole vista of new corruption opens. Most of the crime in this book is in licensed trade.

The authors propose recruitment, selection, and promotion practices they believe will help; above all, they push an independent management system. Cronyism breeds corruption; certainly cronyism protects corruption.

The bar has no cause for sanctimonious rejoicing because this is not an account of crooked policemen bested by good lawyers. Not only are there good policemen here, but there were crooked lawyers to coach and cover crooked police. One of those lawyers ended up with a well-earned sentence himself.

The authors don't relate as much as they might of the organization of the Department of Justice. The story here reveals again what the profession knew: that in the early 1970s no one was minding the store at the department. The Criminal Division, the United States attorneys, the strike forces, and the F.B.I. were separate islands. The present reorganization of the department with, in effect, a civil and criminal deputy attorney general, may reduce or, it is hoped, end the headlessness in this account. Perhaps under Deputy Attorney General Flaherty integrated direction will reduce the cross-purposelessness sadly revealed here. —JOHN P. FRANK

A GOOD MAN: THE LIFE OF SAM J. ERVIN. By Dick Dabney. Houghton Mifflin Company, 1 Beacon Street, Boston, Massachusetts 02107. 1976. $12.50. Pages 356. *Reviewed by Frank P. Ward, Jr., of the North Carolina bar.*

Sam Ervin was hewn into a national monument by the stormy events of 1974. Considerable time will be required to erode the image of the "droll and relentless gentleman quoting Shakespeare and the Bible" in the Watergate hearings. Curiously, however, although almost every American has grown to know Ervin's name, very few have known, truly, what his life has been like. Impelled by that paradox, Dick Dabney commissioned himself to depict the creation of this twentieth century phenomenon.

The senator agreed to co-operate, to sit for his portrait. He expected, no

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doubt, a nice realistic likeness in the manner of Andrew Wyeth or, perhaps, Norman Rockwell. When he arose to inspect the finished product, his reaction was reminiscent of Lyndon Johnson's evaluation of the Peter Hurd portrait as "the ugliest thing I ever saw."

It was not, however, stylistic idiosyncrasies that caused Ervin to lament the biography as the "worst thing that ever happened to him." His principal objection is that he has been represented with a good deal many more warts than he thinks he has.

It may not be entirely fair to invoke Oscar Wilde's dictum, "Every man nowadays has his disciples, and it is always Judas who writes the biography." It is accurate, however, to conclude that Dabney deviates from the biographical standard decreed by Samuel Johnson, who ought to have known, as a "faithful and judicious narrative."

Ervin has always wanted his opponents to believe him a good and kind man, acting from principle. In the senator's view, the Dabney version flings a pot of paint in the face of that aspiration.

It is, in fact, evident from the beginning that Dabney's intentions are not iconographic. The author is trenchantly critical of Ervin's record on civil rights and military matters, especially Vietnam. Conversely, Dabney is unreserved in his praise of the senator's skillful management of the Watergate hearings and in his admiration of Ervin's defense of the rights of citizens to privacy and freedom of speech. Although Dabney labels Ervin "a benign enigma," it is clear that he does not discover the doctrinal consistency Ervin professes. Individual readers will need to make their own judgment of this Whitmanian man, who is undoubtedly large, containing multitudes. Dabney's "good man" verdict will probably be upheld by the senator's traducers and hierophants alike, but Ervin himself apparently considers it damn faint praise.

A problem is that, for a biography, Dabney's work is exceptionally imaginative, too much of his vision being in his own beholding eye. But the characteristics that render Dabney too speculative to be consistently reliable also make him quite readable. No perfunctory chronicler, he writes vividly of "a watermelon-filching sense of exhilaration," or of the "ozone whiff of impeachment." His images are graphic and clever: the famous eyebrows "leap upwards in circumflexes," the familiar face is "a technicolor time study of a rose changing hue." Nixon's assistants are "myrmidons," his Cabinet contains "rich, smooth spaniels."

Dabney, however, can succumb all too readily to the fumes of his intoxicating conceits. For example, Nixon's men are represented as dwelling in "that swampy fetid territory of the spirit, where big money, self-serving pragmatism, and captive intellect lay intercoiled and triumphant, blinking gelidly over the ruins of the Republic."

A Good Man does afford insights useful in understanding its subject, whose life has been directed by industry, integrity, intensity, and imagination. Ervin is convincingly portrayed as genuinely in love with the Senate's "solemnity, slowness, geniality." But he is never undone by his status, sharing the standard of living of his stenographers. Dabney draws Ervin with due deference to his widely recognized "tentative, courtly, humorous style" and undisputed veneration of the Constitution.

Some first-rate Ervin anecdotes are included. As a member of the North Carolina legislature in the 1920s, Ervin opposed a bill designed to interdict the teachings of Darwinism. He noted that "It will gratify the monkeys to know that they are absolved from all responsibility for the conduct of the human race." The jocular attack on the jugular and unflinching adherence to the Constitution anticipated his later posture. Another incident, if it can be credited, is perhaps even more revealing. It is reported that when the senator once attempted to grow potato salad by planting a cubed potato, no one attempted to intervene. As a neighbor explained, "Sam takes notions about things. And the philosophy around here is to leave him alone."

To borrow Conrad Aiken's perceptive phrase, Ervin is indeed "a bright, ambiguous syllable." *A Good Man* may not resolve his ambiguities, but it does settle any lingering doubts that Ervin might have sprung full blown from the brow of Watergate. For all its flaws, this biography is a valuable study of the evolution of Ervin. It is also a worthy addition to the concomitant canon of that once-endangered species, the Southern politician. —FRANK P. WARD, JR.

RIGHT TO COUNSEL IN CRIMINAL CASES. By Sheldon Krantz, Charles Smith, David Rossman, Paul Froyd, and Janis Hoffman. Ballinger Publishing Company, 17 Dunster Street, Harvard Square, Cambridge, Massachusetts

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02138. 1976. $20.00. Pages 874. *Reviewed by Arthur J. Marinelli, professor of business law, Ohio University, Athens, Ohio.*

The Supreme Court in *Argersinger* v. *Hamlin*, 407 U.S. 25 (1972), placed significant new burdens on our criminal justice system. *Argersinger* held that absent a valid waiver, no person may be subjected to imprisonment unless the Sixth Amendment's requirement of counsel was honored. The Boston University Center for Criminal Justice has studied the problem and the implications of the Court's decision, and this book is the center's final report on its findings and strategies for the implementation of the decision.

The book examines the hard realities and present deficiencies of the criminal justice system. The center did extensive field work in four jurisdictions—Birmingham, Alabama; Boston; Cleveland; and Saco, Maine. These general findings show that the appointment of counsel in nonfelony cases is generally token in nature because judges often encourage waiver of counsel and indigency standards are nationally disparate, irrational, and have not been uniformly applied. Other findings are that counsel often is appointed just before trial and is inexperienced or of limited competence and that little attention is given the best disposition of defendants.

The study examines the types of activities brought before the lower criminal courts and finds that certain offenses needlessly clutter the courts, demean the criminal justice process, and place an impossible burden on judges and probation staff. The authors feel that jurisdictions must confront the need to eliminate state involvement in certain offenses and develop alternate methods of dealing with public drunkenness, insignificant drug use, certain consensual sexual activities, nonharmful disorderly conduct, and family disturbances. Rather than being couched in pessimistic terms, the book has been written with the hope of raising standards. There is a range of practical and feasible steps which can be taken on both a short- and long-term basis at every level of government to implement the meaning and spirit of *Argersinger*. Significant change can come about only with concerted action on the part of the legal profession as a whole, law schools, public defender agencies, judges, state legislatures, and the Congress.

The study calls for changes in substantive and procedural criminal law. Review of court rules or legislation that govern the appointment of counsel in nonfelony cases must be of high priority. The authors recommend both short- and long-term court rules and make suggestions about financial eligibility for appointed counsel. All states must provide either a state-supported public defender system or other formalized system for providing appointed counsel. The authors feel that in many cases criminal problems can best be resolved not by prosecution but by informal police handling (such as warnings or voluntary referrals) or formal pretrial intervention programs (such as vocational rehabilitation or family counseling). Legislative authorization and financial support are needed to stimulate and expand these approaches as well as ensure greater accountability and fairness in the pretrial diversion of criminal cases.

The study recommends a defense delivery system using both salaried defenders and private attorneys in an organized fashion. This will provide for the *expertise* of the public defender and the experience and involvement of a broad spectrum of the private bar.

The book is divided into five basic parts. The first two sections introduce the reader to the study and provide a comprehensive analysis of the *Argersinger* case. Part three discusses effectiveness of counsel and is directed primarily to the bar. Part four concerns issues whose resolution lies mainly with legislatures, and the final part focuses on the implementation problems facing planners. Useful documentation, research methodology, selected bibliography, and an indexed summary of recommendations are provided. While it is addressed to many different audiences, the book is of interest to anyone interested in our criminal justice system. The study examines a wide range of problems and offers practical solutions and insights to the criminal process both for the present and the future.

—ARTHUR J. MARINELLI

FROM THE BLACK BAR: VOICES FOR EQUAL JUSTICE. Edited by Gilbert Ware. G.P. Putnam's Sons, 200 Madison Avenue, New York, New York 10016. 1976. $10.00. Pages 341. *Reviewed by Roy E. Willy of the South Dakota bar (Sioux Falls).*

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Ware, who wrote the prologue, but none of the articles, which are in the main critical of the American system of jurisprudence, the courts under which it operates, the law enforcement agencies, the grand jury system, the parole system, the sentencing system, and the prisons.

This theme is expressed in the first article by Howard and Jane Moore:

"On August 7, 1970, Jonathan Jackson walked into a virtually empty courtroom in Marin County, California, and took command at gunpoint of the proceedings. He liberated three black inmates, two of whom were killed along with a superior court judge as they attempted to drive away in a rented Hertz van. That act of courage and total devotion to the liberation of black people touched off a spark which ignited the prison movement throughout the United States.

"Through firm control of the legislative, law enforcement, and the criminal labeling processes, the white racist ruling class defines what acts are criminal and fixes penalties. Thus criminal law, in both content and administration, is a political instrument, written and enforced by the powerful against the poor and powerless, who are for the most part blacks or other ethnic minorities."

While in the main still critical of American jurisprudence, the remaining articles are far more moderate in tone and are the products of black lawyers, judges, and educators, many of whom have obtained high standing.

An organization of black judges was formed from the National Bar Association about six years ago, and many of the papers and articles in this book are from speeches delivered or papers read at sessions of this judicial association. The general theme that runs through the articles is that the American judicial structure is racist and tends to protect the wealthy, who are mainly white, from the minority groups, who are largely poor and generally black. Those members of the black minority group who rebel against the system are referred to as "deviates" rather than criminals, and it is contended that the laws, the courts, and the agencies that enforce them are geared to hold down the poor and protect the entrenched society of the whites.

No effort is here made to review the numerous articles in this book but rather the general theme and tone of the articles as set forth above. Many agencies within and without the government have of recent years devoted considerable time, money, and effort to ensure that there is a much broader range of opportunity and representation available to the poor regardless of race, color, or religion. But the articles in this book would indicate that there is still much to be done. —ROY E. WILLY

BORN ON THE FOURTH OF JULY. By Ron Kovic. McGraw-Hill Book Company, 1221 Avenue of the Americas, New York, New York 10020. 1976. $7.95. Pages 208. *Reviewed by Donald C. Galbasini of the California, Oregon, and Arizona bars.*

What would you be like if your birthday were the Fourth of July? Probably, like author Ron Kovic, you would be a proud American. Kovic, thirty-one years old on July 4, 1977, grew up in Massapequa, Long Island, dreaming of being a major league baseball player and a John Wayne type of hero leading his fellow soldiers into battle.

He played baseball in the Massapequa Little League, where he hit a seven-error home run his first time at bat, watched television, was faithful to his church,

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and saw his idol, John Wayne, in battle on the silver screen. He even received his long-sought opportunity to try out with the New York Yankees but "chickened out when the morning came to leave for the station."

He enlisted in the spit-and-polish Marine Corps when he was seventeen and soon found out it was not all dress blue uniforms, but sweaty, profane, and almost degrading. But Kovic persevered and became an excellent and dedicated soldier. He found Vietnam to be a grim, dirty, frustrating war where it was difficult to realize his dreams of heroism. In fact, during one attack Kovic accidentally shot and killed a fellow soldier from his own outfit. In a later action he led a squad of soldiers that mistakenly shot up a hut, killing a bunch of kids and some old men. Both incidents were to haunt him for a long time and contribute greatly to events that later changed his life.

Instead of being a hero he was badly wounded and paralyzed from the chest down. His only medal was a Purple Heart. What followed was an unbelievable series of humiliating and shoddy episodes in various hospitals. The treatment and indifference turned the one-time hawk into an antiwar dove.

The new Kovic, reborn with a sense of community with other Vietnam vets, gave speeches all over, marched in a wheel chair during an antiwar demonstration, in Washington, D.C., and conned his way into the Republican National Convention in Miami, where he created a scene and drew attention to his new cause as a stop-the-war activist.

His description of the treatment given the wounded soldiers in the hospital is almost unbelievable, ranging from inexperienced hospital workers, indifference and filth in wards, to prowling rats fed by patients to keep them from chewing on numb limbs. Glad to be alive but greatly concerned by his sexless condition, Kovic is tormented no end—so many things to shape a life! "I am the living death, the memorial on wheels, I am your yankee doodle dandy, your john wayne come home, your fourth of july firecracker exploding in the grave."

Kovic deserved to be the hero of his dreams and probably was justified, at least in his mind, to become the antiwar dove and an idol of the radicals. He has written a very readable story of what war does to human beings. If you were a hawk you may not like what you read, but unless you have a queasy stomach, this powerful book should be a must on your reading list.

—DONALD C. GALBASINI

UNITED STATES ATTORNEY: AN INSIDE VIEW OF "JUSTICE" UNDER THE NIXON ADMINISTRATION. By Whitney North Seymour, Jr. William Morrow and Company, 105 Madison Avenue, New York, New York 10016. 1975. $8.95. Pages 248. *Reviewed by Richard J. Hoskins of the Illinois and New York bars.*

When Whitney North Seymour, Jr., was United States attorney for the Southern District of New York (from 1970 to 1973), he wrote an essay as part of a job description for prospective assistant United States attorneys describing that office. It was called "The Best Public Law Job in the Nation" and began by quoting Henry L. Stimson, Seymour's predecessor in 1906: "There is no other public office which makes such a direct and inspiring call upon the conscience and professional zeal of a high-minded lawyer as that office. . . . It

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has always been my first love."

Seymour's book begins by borrowing from that quotation. His near reverence for the office makes it the center of the book, but his themes are broader: the satisfaction of serving one's ideals by exercising power in the public interest; the feeling of betrayal when in the public's perception the fallout of Watergate contaminated government service at all levels.

Although not tightly organized, the book covers a wide range of subjects in a chatty, rambling way: a brief history of federal law enforcement since the early days when the attorney general was restricted to representing the government in the Supreme Court and provided legal opinions to the executive branch, leaving all other federal law enforcement to the local United States attorneys; a persuasive pitch for the more creative use of the United States attorney's civil jurisdiction in law enforcement; a biting survey of the frustrating bureaucracy of the Department of Justice, featuring a few "vignettes . . . of what can happen to an agency that has grown too large and lacks effectiveness"; a discussion of the daily interplay between the United States attorney's office and the various federal criminal investigative agencies; and, of course, Watergate.

Seymour believes that federal law enforcement's most important responsibility is the investigation and prosecution of crimes by business and professional people, long a specialty in the Southern District. He calls business executives "hypocritical in their views about crime. They vigorously condemn muggers and robbers but silently tolerate their own kind of crime among colleagues." He makes an emphatic case for continuing and increasing the role of the Internal Revenue Service in fighting white-collar crime, despite the post-Watergate criticism attracted by that role.

The book excoriates the Federal Bureau of Investigation. Seymour devotes his lengthiest chapter (and parts of others) to "The Decline of the F.B.I." He charges that the bureau's concern for its public image has eclipsed its effectiveness, that it is generally uninterested in crimes whose proof requires "initiative or special sophistication," such as complex business and financial crimes, that it co-operates poorly with other federal agencies and avoids investigations into police corruption from fear of offending local law enforcement agencies, and that in general it suffers from advanced bureaucratic lethargy.

Throughout the book are instances Seymour observed of arrogance and political expediency in the Nixon Justice Department. In response, the last chapter of the book is Seymour's plan for reforming federal law enforcement: essentially, to split the Justice Department and the F.B.I. in two. The attorney general would be the president's legal adviser and handle legislative affairs and local law enforcement assistance. The chief prosecutor would be wholly nonpolitical, responsible only to the attorney general and only for the joint establishment of broad law enforcement goals and policies.

The plan is not wholly original, but it has added force at the end of a book that has focused on specific shortcomings of federal law enforcement, particularly those resulting from improper political pressures within the administration and from the F.B.I.'s obsession with public image and bureaucratic independence.

Seymour is not a lively writer. He speaks with the force of straightforward conviction, but seldom with style. Nevertheless, the book is worth reading now more than ever after the shocks of Watergate have passed and the work of adopting specific reforms—particularly in law enforcement—has barely begun.

—RICHARD J. HOSKINS

Casebook Corner

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Supreme Court Report

by Rowland L. Young

THE COURT'S decision on June 28 upholding a statute that in effect makes former President Nixon's presidential papers public documents is, as Justice Powell observes, only the beginning: "The difficult constitutional questions lie ahead." At first blush the proposition that presidential papers should belong to the public is appealing. They are, after all, a byproduct of the work the president is being paid to do. They are created on time paid for by the public and ought to belong to the public, the argument goes, just as a patent for an invention produced by government scientists hired by the public belongs to the people who paid for it.

The analogy, however, fails to take into account the extraordinary complexity of the presidential office and the highly sensitive nature of many of the documents that the president must produce and have produced for him.

The statute in question applies only to Mr. Nixon, which in itself raises a serious constitutional problem, but the issues it raises strike at the roots of the fundamental constitutional principle of separation of powers. One need not agree with Justice Rehnquist that the statute is a sword of Damocles over the heads of all future occupants of the White House to realize that this is the most important constitutional decision of the term that ended June 29, and perhaps the most important constitutional decision of the decade.

Another decision reported this month involves the "Great Zacchini," a performer who makes his living as a human cannonball. His name has probably in a sense been immortalized by the Court's holding, also on June 28, that he had a "right of publicity" in his performance that was superior to the First Amendment rights of a television station that filmed his act and televised it.

If the facts of the case and the sound of the petitioner's name are not enough to make it a favorite for future editors of casebooks, the Court's recognition in it of a "right to publicity," as a variation of the "right to privacy" seems sure to guarantee that this case will live in the minds of future lawyers and law students, along with such unforgettable names as *Palsgraf* v. *Long Island Railroad*, *Sherwood* v. *Walker*, *Scott* v. *Shepherd*, and *Fletcher* v. *Rylands*.

The Court's May 31 holding in a zoning case coming from a suburb of Cleveland is clearly a limitation on its decision three years ago in *Village of Belle Terre* v. *Boraas*, 416 U.S. 1, approving an ordinance that limited land use to single family dwellings. In the new case, the ordinance had a definition of the word "family" that prohibited a grandmother from providing a home for her ten-year-old orphaned grandson. The Court overturned her conviction for violating the provision in a five-to-four decision that had no majority opinion. Justice Powell, speaking for himself and Justices Brennan, Marshall, and Blackmun, argued that the ordinance violated due process because it was an intrusive regulation of the family that the city had been unable to justify, while Justice Stevens saw the ordinance as an invasion of privacy.

The dissenters are split three ways—the chief justice arguing that the grandmother should have been required to exhaust her remedy to seek a variance from the ordinance, Justices Stewart and Rehnquist were of the opinion that the case was controlled by *Belle Terre*, and Justice White apparently took the view that the Court was reviving a theory of "substantive due process."

On June 27 the Court upheld a district court's determination that requiring minimum height and weight for jobs as prison guards establishes a prima facie case of discrimination against women under Title VII of the Civil Rights Act of 1964. The case was brought by an Alabama woman who wanted to serve as a prison guard in male penitentiaries, but her victory was hollow because the Court went on to hold that she had properly been denied employment on the ground that gender was a bona fide occupational qualification.

The Court's May 23 holding that states may permit agency shops for state employees—in short that state employees may be required to pay union dues against their will—was hailed as a victory for labor, but labor has not won the war, as the concurring opinions of Justices Powell, Rehnquist, and Stevens demonstrate. The state courts decided solely on the pleadings, so the real decision of the Court is merely that the allegations of the teachers that the union's use of their money for political purposes to which they are opposed raises serious First Amendment problems, which will be considered on remand.

Court Upholds Constitutionality of Presidential Papers Act

The decisions in *Nixon* v. *Administrator of General Services*, 433 U.S. — ,53 L.Ed. 2d 867, 97 S.Ct. 2777, 45 U.S.L.W. 4917, decided June 28, are long—they will take up more than 130 pages in the official reports. The Court's decision upholds the validity of the Presidential Recordings and Materials Preservation Act, signed into law by President Ford in December, 1974. The act provides that the Administrator of General Services shall take possession of all the former president's papers and screen them to determine which are personal and private and which have historical value. The act provides that the latter are to be retained and requires the administrator to determine by regulation the terms and conditions upon which the public may have access to them. The act has two titles, the first applicable to the papers of President Nixon specifically, the second creating the National Study Commission on Records and Documents of Federal Officials.

None of the regulations contemplated by the statute are in effect, because they must be submitted to both houses of Congress for approval, and none of the proposed regulations has so far won approval.

The former president attacked the first title alleging that it was unconstitutional on its face as a violation of (1) the doctrine of separation of powers; (2) the presidential privilege; (3) his own privacy; (4) his rights of association under the First Amendment; and (5) the bill of attainder clause in Article, 1, Section 9 of the Constitution.

A three-judge district court upheld the validity of the statute. 408 F.Supp. 336 (1976).

The Supreme Court affirmed in an opinion by Justice Brennan in which Justices Stewart, Marshall, and Stevens joined. Justices White, Powell, and Blackmun joined in parts of the opinion, filing separate decisions, while Chief Justice Burger and Justice Rehnquist wrote dissents.

The Court's opinion was divided into seven parts, the first of which gave the "background," the second explained the provisions of the statute, and the remaining five parts discussed each of the points raised by Mr. Nixon in turn. In each instance the Court upheld the district court, although not always for the same reasons.

As for the argument that the statute violated the concept of separation of powers, the Court pointed out that it was supported by both Presidents Ford and Carter, and that the Court has held several times that the separation of powers is not absolute, citing both *Youngstown Sheet and Tube Company* v. *Sawyer*, 343 U.S. 579 (1952), the case involving President Truman's seizure of the steel mills, and *United States* v. *Nixon*, 418 U.S. 683 (1974), the case holding that the Nixon papers and tapes could be subpoenaed. The Court pointed out that the statute left the documents in the hands of the executive department and that the act "facially is designed to ensure that the materials can be released only when release is not barred by some applicable privilege inherent in that branch." "Thus, whatever are the future possibilities for constitutional conflict in the promulgation of regulations respecting public access to particular documents, nothing contained in the Act renders it unduly disruptive of the Executive Branch and, therefore, unconstitutional on its face," the Court declared.

As for the presidential privilege, the Court pointed out that *Nixon* v. *United States* had held that that was a qualified privilege, and it agreed that it survived the tenure of the president. "The expectation of the confidentiality of executive communications . . . has always been limited and subject to erosion over time after an administration leaves office," the Court said, and there was no reason to believe that screening by professional archivists, "whose record for handling confidential material is unblemished," would interfere with the executive's confidential communications.

To the claim that the statute invaded the former president's privacy, the Court pointed out that only a small portion of the 42 million pages of documents involved such matters as "extremely private communications between [Nixon] and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends as well as personal diary dictabelts and his wife's personal files." Review of the documents to screen out these "can hardly differ materially from that contemplated by appellant's intention to establish a Presidential Library, for Presidents who have established such libraries have found that screening by professional archivists was essential," the Court declared.

The claim of violation of "associational privacy," the Court said, was not significantly different from the privacy claim. The argument was that disclosure of the documents dealing with political activities would invade "the private formulation of political thought critical to free speech and association, imposing sanctions upon past expressive activity, and more significantly, limiting that of the future because individuals who learn the substance of certain private communications by [him] . . . will refuse to associate with him." The Court agreed with the district court that "there was no reason to believe that the mandated regulations when promulgated would not adequately protect against access to materials implicating appellant's privacy in political association . . . ."

The Court refused to hold that the statute was a bill of attainder, saying that it imposed no punishment and that there were no punitive sentiments in the debate that preceded its enactment. "In short," the Court said, "appellant constituted a legitimate class of one . . . ."

Justice White wrote an opinion concurring except for that part of the Court's opinion on the bill of attainder question. As to that, he agreed with the result: "the statute does not impose 'punishment' and is not, therefore, a bill of attainder." He emphasized the importance of delivery of private papers to the former president.

Justice Blackmun, concurring in part and in the judgment, said that his view of the case was similar to that of Justice Powell, except that he fell "somewhat short of sharing the view that [President Carter's] submission, made through the Solicitor General, that the Act serves rather than hinders the Chief Executive's Article II functions, is dispositive of the separation of powers issue." He also expressed the hope that the act would not "become a model for the disposition of the papers of each President who leaves office at a time when his successor or the Congress is not of his political persuasion."

Justice Powell's opinion called attention to "the limited justification for and objectives of this legislation. The extraordinary events that led to the resignation and pardon, and the agreement that the record of those events might be destroyed by President Nixon, created an impetus for congressional action that may—without overstatement—be termed unique," he said.

He called attention to the narrow scope of the district court's decision: "Is the regulatory scheme enacted by Congress unconstitutional without reference to the content of any conceivable set of regulations falling within the scope of the Administrator's authority . . . . ?" In general, Justice Powell said, "I believe that Congress unquestionably has acted within the ambit of its broad authority to investigate, to inform the public, and ultimately, to legislate against suspected corruption and abuse of power in the Executive Branch."

Justice Stevens's concurring opinion stressed the validity of the Court's view that President Nixon was "a legitimate class of one." "Appellant resigned his office under unique circumstances and accepted a pardon for offenses committed while in office," he said. "By doing so, he placed himself in a different class from all other Presidents."

Chief Justice Burger dissented, saying that the decision was "a grave repudiation of nearly 200 years of judicial precedent and historical practice." In his view, Title I of the statute violates the doctrine of separation of powers because the General Services Administration is a creature of Congress. "Separation of powers is fully implicated simply by Congress' mandating what disposition is to be made of the papers of

another Branch," the dissent said. The statute, the dissent continued, "is an attempt by Congress to exercise powers vested exclusively in the President—the power to control files, records and papers of the office, which are comparable to the internal workpapers of Members of the House and Senate."

The chief justice also dissented on the Court's view of the issue of privacy, pointing out that a former president "up to now has had essentially the same expectation of privacy with respect to his papers and records as every other person. This expectation is soundly based on two factors: first, under our constitutional traditions, Presidential papers have been, for more than 180 years, deemed by the Congress to belong to the President."

The chief justice also argued that the act was a bill of attainder. It is, he said, "special legislation singling out one individual as the target."

Justice Rehnquist's dissent was summarized in the first paragraph of his opinion: "Today's decision countenances the power of any future Congress to seize the official papers of an outgoing President as he leaves the inaugural stand. In so doing, it poses a real threat to the ability of future Presidents to receive candid advice and to give candid instructions. This result, so at odds with our previous case law on the separation of powers, will daily stand as a veritable sword of Damocles over every succeeding President and his advisors."

Human Cannonball Has a "Right of Publicity"

The human cannonball case was *Zacchini* v. *Scripps-Howard Broadcasting Company*, 433 U.S.—, 53 L.Ed. 2d 965, 97 S.Ct. 2849, 45 U.S.L.W. 4954, decided June 28. The decision was that the First Amendment does not protect the media when they broadcast an entire performance without the consent of the performer. The effect of the decision was to uphold Ohio's "right of publicity" tort.

Zacchini is an entertainer whose act consists of being shot from a cannon onto a net some two hundred feet away. Each performance takes about fifteen seconds. The case arose when a television station in Burton, Ohio, videotaped his act and televised it in spite of his request that it not do so. He brought an action for damages, alleging that the station was guilty of an "unlawful appropriation" of his personal property. The trial court granted summary judgment for the station, but the Ohio Court of Appeals reversed, holding that the complaint stated a cause of action for Zacchini's "right of publicity" in the film of his act. The Ohio Supreme Court agreed that the complaint stated a cause of action under Ohio law but ruled that the station had a "privilege to report in its newscasts matters of legitimate public interest which would otherwise be protected by an individual's right of publicity." 47 Ohio St. 2d. 224, 351 N.E. 2d 454 (1976). The state court relied heavily on *Time, Inc.* v. *Hill*, 385 U.S. 374 (1967), a case it construed as holding that "the press has a privilege to report matters of legitimate public interest even though such reports might intrude on matters otherwise private." From this, the state court concluded that the press is also "privileged when an individual seeks to publicly exploit his talents while keeping the benefits private."

Justice White recalled Prosser's division of the law of privacy into four different torts and pointed out that the *Time* case involved publicity that places the plaintiff in a "false light" in the public eye. This case, he said, was an "appropriation" case, in which Zacchini's act had been taken and used. The state's interest in permitting a "right of publicity" was analogous to the goals of patent and copyright law, he pointed out, and a "right of publicity" case differs from "false light" case in the way it intrudes on dissemination of information to the public. In the latter, the only way to protect the interests involved is to minimize publicity, while in the former the plaintiff usually has no objection to publication as long as he reaps the commercial benefit. Here, the Court pointed out, Zacchini wanted damages, not an injunction against broadcasting his act.

"Wherever the line in particular situations is to be drawn between media reports that are protected and those that are not, we are quite sure that the First and Fourteenth Amendments do not immunize the media when they broadcast a performer's entire act without his consent," the Court concluded. "The Constitution no more prevents a State from requiring respondent to compensate petitioner for broadcasting his act on television that it would privilege respondent to film and broadcast a copyrighted dramatic work without liability to the copyright owner .... The broadcast of a film of petitioner's entire act poses a substantial threat to the economic value of that performance."

Justice Powell, joined by Justices Brennan and Marshall, dissented, taking the position that the station had simply reported on a newsworthy event. The question was not whether Zac-

chini's entire act was performed, the dissent argued, "When a film is used, as here, for a routine portion of a regular news program, I would hold that the First Amendment protects the station from a 'right of publicity' or 'appropriation' suit, absent a strong showing by the plaintiff that the news broadcast was a subterfuge or cover for private or commercial exploitation."

Justice Stevens dissented on the ground that it was unclear whether the Ohio court had rested the opinion on state or federal grounds. He would have remanded for a resolution of that question.

"One-Family" Residence Act May Not Exclude Grandchildren

The zoning case was *Moore* v. *City of East Cleveland*, 431 U.S. —, 52 L.Ed. 2d 531, 97 S.Ct. 1932, 45 U.S.L.W. 4550, decided May 31. The decision reversed a ruling that upheld the criminal conviction of a grandmother for violating an ordinance that limits occupancy of a dwelling unit to one family. Her house did not qualify as a one-family residence because she shared it with her son and two grandsons, one of whom was the child of another son. This violated the ordinance which defines "family," the applicable provision being that "a family may include not more than one dependent married or unmarried child of the nominal head of the household and the spouse and dependent children of such dependent child."

Mrs. Moore received notice of violation of the ordinance in 1973, stating that the second grandson was an "illegal occupant." When she failed to remove the second grandson—who was ten years old—the city filed a criminal charge. She moved to dismiss, claiming that the ordinance was unconstitutional on its face. Her motion was overruled, and she was found guilty and sentenced to five days in jail and a $25 fine. The Ohio Court of Appeals affirmed.

The Supreme Court reversed. Justice Powell announced the judgment of the Court and an opinion in which he was joined by Justices Brennan, Marshall, and Blackmun.

The city argued that the case was decided by *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974), which upheld a zoning ordinance that limited land use to one family dwellings and forbade occupancy by more than two unrelated persons. Saying that *Belle Terre* had been upheld on the ground that it bore a "rational relationship to permissible state objectives," Justice Powell declared that "one overriding factor sets this case apart from *Belle Terre*. The ordinance there affected only *unrelated* individuals. It expressly allowed all who were related by 'blood, adoption, or marriage' to live together, and in sustaining the ordinance we were careful to note that it promoted 'family needs' and 'family values.' . . . East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself."

The opinion agreed that the alleged goals of the ordinance—to prevent overcrowding, minimize traffic, and avoid an undue burden on the school system—were legitimate, but it said that the ordinance "serves them marginally at best."

"When a city undertakes . . . intrusive regulation of the family," Justice Powell said, "the usual judicial deference to the legislature is inappropriate. 'This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.' . . . A host of cases . . . have consistently acknowledged a 'private realm of family life which the state cannot enter.' "

The opinion added that, "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."

Justice Brennan, joined by Justice Marshall, wrote a concurring opinion to "underscore the cultural myopia of the arbitrary boundary drawn by the East Cleveland ordinance in the tradition of the American home that has been a feature of our society since our beginning as a Nation—the 'tradition . . . of uncles, aunts, cousins and especially grandparents sharing a household along with parents and children . . . .' "

Justice Stevens wrote an opinion concurring in the judgment. His position was that the ordinance was an unreasonable restriction on Mrs. Moore's right to use her own property as she saw fit. "There appears to be no precedent for an ordinance which excludes any of an owner's relatives from the group of persons who may occupy his residence on a permanent basis," Justice Stevens said. "Nor does there appear to be any justification for such a restriction on an owner's use of his property. The city has failed totally to explain the need for a rule which would allow a homeowner to have two grandchildren live with her if they are brothers, but not if they are cousins."

Chief Justice Burger dissented on the ground the doctrine of exhaustion of remedies should be applied. Mrs. Moore had deliberately refused to apply for a variance from the ordinance which would alleviate "practical difficulties and unnecessary hardships," he said. He argued that, in view of the congestion in the court system, the Court "should now make unmistakably clear that when state or local governments provide administrative remedial procedures, no federal forum will be open unless the claimant can show either that the remedy is inadequate or that resort to those remedies is futile."

Justice Stewart, joined by Justice Rehnquist, dissented, taking the position that the Court should follow *Belle Terre*. "To suggest that the biological fact of common ancestry necessarily gives related persons constitutional rights of association superior to those of unrelated persons is to misunderstand the nature of the associational freedoms that the Constitution has been understood to protect," he declared.

Justice White dissented, stating his view that the ordinance did not violate the due process clause because it was "the product of a duly enacted or promulgated statute, ordinance, or regulation . . . that is not wholly lacking in purpose or utility."

Height Requirement for Prison Guards Not "Job Related"

In *Dothard* v. *Rawlinson*, 433 U.S. —, 53 L.Ed. 2d 786, 97 S.Ct. 2720, 45 U.S.L.W. 4888, decided June 27, the Court held that height and weight requirements for applicants for positions as prison guards violated the statute, but it ruled that the district court was wrong in holding that another requirement did not fall within the narrow ambit of the bona fide occupational qualification exception of Section 703e.

The appellee, Dianne Rawlinson, applied for a job as a prison guard with the Alabama Board of Corrections. She brought this suit under Title VII of the Civil Rights Act of 1964 after her application was denied because she did not meet the minimum weight requirement of 120 pounds. Alabama also requires that prison guards be at least 5 feet 2 inches tall. While the suit was pending, the state board of corrections adopted a new regulation that established "gender citeria" for assigning guards to maximum security institutions for "contact positions," that is, positions requiring continual close proximity to

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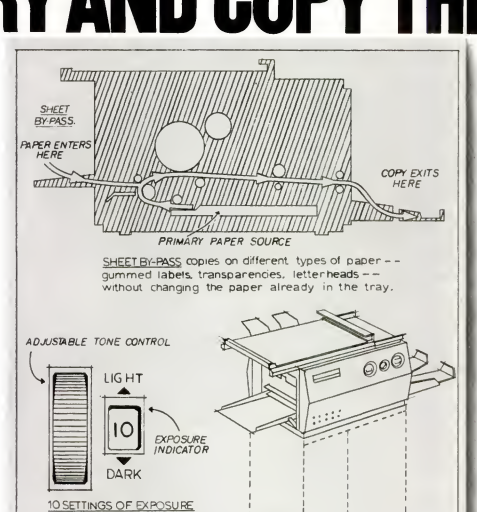

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inmates. The appellee amended her class action to challenge the new regulation.

The district court found that the height requirement would eliminate 33.29 per cent of women in the United States, but only 1.28 per cent of the men, and that the weight requirement would eliminate 22.29 per cent of the women, but only 2.35 per cent of the men. Combined, the two restrictions would eliminate 41.13 per cent of the female population as compared with less than 1 per cent of the male. From this the district court concluded that the appellee had made a prima facie case of unlawful sex discrimination. The court rejected the state's contention that the height and weight requirements were related to the job on the ground that it had produced no evidence correlating height and weight with the requisite amount of strength thought essential for prison guards. The district court also rejected the argument that the new regulation, which explicitly discriminated against women on the basis of their sex, came under Section 703e, which permits such discrimination "in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."

Speaking through Justice Stewart, the Supreme Court sustained the district court on the height and weight requirement issue and on the ruling that the requirements were not job related, but it reversed as to the bona fide occupational qualification issue. Saying that the "environment in Alabama's penitentiaries is a peculiarly inhospitable one for human beings of whatever sex," the Court declared that more was at stake "than an individual woman's decision to weigh and accept the risks of employment in a 'contact' position in a maximum security male prison . . . . The essence of a correctional counselor's job is to maintain prison security. A woman's relative ability to maintain order in a male, maximum security, unclassified penitentiary . . . could be directly reduced by her womanhood."

Inmate sex offenders who have assaulted women in the past might be moved to do so again if they had access to women in prison, the Court said. Likewise, other inmates might assault women guards because they are deprived of a normal sexual environment. "The likelihood that inmates would assault a woman because she was a woman would pose a real threat not only to the victim of the assault but also to the basic control of the penitentiary and protection of its inmates and the other security personnel," the Court added. "The employee's very womanhood would thus directly undermine her capacity to provide the security that is the essence of a [guard's] responsibility."

Justice Rehnquist, joined by Chief Justice Burger and Justice Blackmun, concurred in the result, stating his view that, while the district court was "not in error" in this case in its height and weight conclusions, there are other cases in which height-and-weight requirements might be sufficiently job related to rebut the prima facie case and shift the burden to the job applicant.

Justice Marshall, joined by Justice Brennan, dissented as to the bona fide occupational holding, taking the position that there was nothing in the record to show that women guards would create any danger to security in Alabama prisons that does not already exist. The gist of the Court's ruling, the opinion said, is that "women as guards will generate sexual assaults. With all respect, this rationale regrettably perpetuates one of the most insidious of the old myths about women—that women, wittingly or not, are seductive sexual objects. The effect of the decision . . . is to punish women because their very presence might provoke sexual assaults."

Justice White dissented on the ground that there was no showing that the percentage of women applying for jobs as prison guards in Alabama approximates the percentage of women in the national population. He was therefore not, he said, "convinced that a large percentage of the actual women applicants, or of those who are seriously interested in applying, for prison guard positions would fail to satisfy the height and weight requirements."

Entire Metropolitan Area Is Relevant Market for Teachers

The second Title VII case was *Hazelwood School District* v. *United States*, 433 U.S. ___, 53 L.Ed. 2d 768, 97 S.Ct. 2736, 45 U.S.L.W. 4882, decided June 27. In the decision, the Court remanded a case of alleged racial discrimination in the hiring of public school teachers for further statistical findings.

The case involved the Hazelwood School District near Saint Louis. The government brought suit under Title VII, alleging a history of racial discrimination, statistical disparities in hiring black teachers, standardless and subjective hiring procedures, and specific instances of discrimination against blacks who applied for teaching jobs. The district offered little additional evidence, citing deficiencies in the government's case and its own announced policy of nondiscrimination. The district court entered judgment for the school district, partly because the district contained only a small percentage of black students. The Eighth Circuit reversed, largely on the ground that the district court should not have relied upon the comparison between the number of black teachers and black students in the Hazelwood district, but rather on the number of black teachers available in the relevant labor market area, which included Saint Louis. In that area, 15.4 per cent of the teachers were black, whereas Hazelwood, in the years 1972–73 and 1973–74 had a teaching staff consisting of 1.4 per cent and 1.8 per cent respectively of blacks. 534 F.2d 805 (1976).

Speaking through Justice Stewart, the Supreme Court vacated the judgment and remanded. The Court cited its May 31 decision in *International Brotherhood of Teamsters* v. *United States*, 431 U.S.— (63 A.B.A.J. 1126), for the proper "role of statistics in pattern or practice suits under Title VII." "In that case," said the Court, "we stated that it is the Government's burden to 'establish by a preponderance of the evidence that racial discrimination was the [employer's] standard operating procedure—the regular rather than the unusual practice.'" The *Teamsters* case further established that statistics can be "an important source of proof in employment discrimination," the Court continued, and the district court's treatment of statistics here "fundamentally misconceived" their role in employment discrimination cases.

The Eighth Circuit was correct in its view that the proper comparison was between the racial composition of Hazelwood's teaching staff and the racial composition of the qualified public school teacher population in the relevant labor market, the Court said, but it had erred in totally disregarding the "possibility that this prima facie statistical proof in the record might at the trial court level be rebutted by statistics dealing with Hazelwood's hiring after it became subject to Title VII." "Racial discrimination by public employers was not made illegal under Title VII until March 24, 1972," the Court pointed out. "A public employer who from that date

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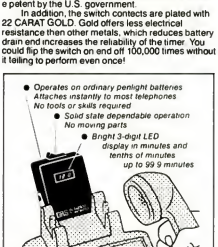

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forward made all its employment decisions in a wholly nondiscriminatory way would not violate Title VII even if it had formerly maintained an all-white work force by purposefully excluding Negroes."

The Court vacated the judgment and remanded for determination of whether Hazelwood engaged in a pattern of employment discrimination after March 24, 1972.

Justice Stevens dissented, taking the view that the government had plainly made out its prima facie case, Hazelwood had failed to rebut it, and therefore there was no reason for a remand.

Justice Brennan, who joined in the Court's opinion, wrote a concurring opinion that stated that the remand was "appropriate and will allow the parties to address [the statistical] figures with greater care and precision."

Agency Shop for Public Employees Does Not Violate Constitution

The agency shop case was *Abood* v. *Detroit Board of Education*, 431U.S.____, 52 L.Ed. 2d 261, 97 S.Ct. 1782, 45 U.S.L.W. 4473, decided May 23. The decision upheld Michigan legislation that authorizes a system of union representation for local governmental employees.

The case arose after the Detroit Federation of Teachers was certified as the exclusive representative of teachers employed by the Detroit Board of Education. The collective bargaining agreement provided for an agency shop—every teacher in the system who had not become a union member by the specified date was required to pay a service charge, equal to the regular dues, to the union. A teacher who did not pay the charge was subject to discharge.

Teachers in the system filed suits challenging the agency-shop clause, asking that it be declared invalid under the Constitution as a deprivation of freedom of association protected by the First and Fourteenth amendments. The suits were consolidated in the Michigan Court of Appeals, which held the statute constitutional under the doctrine of *Railway Employees' Department* v. *Hanson*, 351 U.S. 225 (1956), which upheld the constitutionality of a union-shop clause in the Railway Labor Act. The state court noted, however, that Michigan law permits union expenditures for lobbying and support of political candidates, and that this support state court's decisions were based on the amendment rights of the plaintiffs. The state court's decisions were based on the allegations in the complaints, since the lower court had dismissed for failure to state a cause of action. The appellate court decision is reported at 60 Mich. App. 92, 230 N.W. 2d 322 (1975).

The Supreme Court vacated and remanded in an opinion by Justice Stewart. The Court relied heavily upon *Railway Employees' Department* v. *Hanson*, and *International Association of Machinists* v. Street, 367 U.S. 740 (1961), a decision that held that the use of compulsory union dues for political purposes is illegal.

The Court pointed out that the National Labor Relations Act leaves the regulation of the labor relations of state and local governments to the states. "Michigan has chosen to establish for local government units a regulatory scheme which, although not identical in every respect to the NLRA or RLA is broadly modeled after federal law," the Court said, and the "same important government interests recognized in the *Hanson* and Street cases presumptively support the impingement upon associational freedom created by the agency shop here at issue." Those interests include the promotion of peaceful labor relations and avoidance of the confusion that might occur from having two representatives for employees. There can be "no principled basis for according that decision [of the Michigan legislature] less weight in the constitutional balance than was given in *Hanson* to the congressional judgment reflected in the Railway Labor Act," the Court declared.

The Court rejected arguments that government employment should be treated differently from employment by private firms and that collective bargaining by and for public employees is itself inherently political.

Since the Michigan appeals court had ruled that the state law "sanctions the use of nonunion members' fees for purposes other than collective bargaining," the Court said that the principles of Street applied, and that the Michigan court had erred in holding that each appellant had to specify exactly what expenditures he found objectionable.

Justice Powell, joined by the chief justice and Justice Blackmun, wrote an opinion that concurred in the judgment to the extent that it concluded that "the general allegations of the complaint, if proven, establish a cause of action under the First and Fourteenth Amendments." Justice Powell disagreed with much of what the Court said, however, declaring that the Court was announcing "a sweeping limitation of First Amendment rights . . . not only unnecessary on this record . . . [but also] unsupported by either precedent or reason." In the *Hanson* case, Justice Powell said, the Court was dealing only with congressional permission for a union shop. Congress had not compelled or required the carriers and their employees to enter into union shop agreements. Both *Hanson* and Street should be read narrowly, Justice Powell continued. "The only constitutional principle for which they clearly stand is the narrow holding of *Hanson* that the Railway Labor Act's authorization of voluntary union-shop agreement in the private sector does not violate the First Amendment." In contrast, the opinion went on, "[t]he state in this case has not merely authorized union-shop agreements between willing patles; it has negotiated and adopted such an agreement itself. . . . Accordingly, the Board's collective bargaining agreement, like any other enactment of state law, is fully subject to the constraints that the Constitution imposes on coercive governmental regulation." Justice Powell added that he would make it "more explicit that compelling a government employee to give financial support to a union in the public sector — regardless of the uses to which the union puts the contribution — impinges seriously upon interests in free speech and association protected by the First Amendment."

Justice Rehnquist wrote a concurring opinion that reiterated his agreement with Justice Powell's dissent in *Elrod* v. *Burns*, 427 U.S. 347 (1976), a case decided last term in which the Court held that patronage employees could not be dismissed simply because they belonged to a losing political party. Justice Rehnquist said that he could not have agreed with the Court in this case had he been in the majority in *Elrod*. "I am unable to see a constitutional distinction between a governmentally imposed requirement that a public employee be a Democrat or Republican or else lose his job, and a similar requirement that a public employee contribute to the collective-bargaining expenses of a labor union," he declared.

Justice Stevens concurred on the basis he did not understand the Court to hold that "the remedies described in Street . . . would necessarily be adequate in this case or in any other case. He said that the Court's opinion "does not foreclose the argument that the Union should not be permitted to exact a service fee from nonmembers without first establishing a procedure which will avoid the risk that their funds will be used, even tem-

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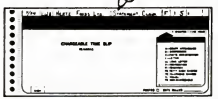

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porarily, to finance ideological activities unrelated to collective bargaining."

No Unemployment Benefits for Work Lost because of Strike

In *Ohio Bureau of Employment Services v. Hodory*, 431 U.S. ___, 52 L.Ed. 2d 513, 97 S.Ct. 1898, 45 U.S.L.W. 4544, decided May 31, the Court held valid an Ohio provision that denies unemployment compensation to workers whose unemployment is "due to a labor dispute other than a lockout at any factory . . . owned or operated by the employer by which he is or was last employed."

Hodory was a millwright apprentice at the United States Steel Corporation's works at Youngstown, Ohio. He was furloughed when a coal miners' strike forced the plant to close. He applied for and was denied unemployment compensation and brought this suit against the Ohio Bureau of Employment Services alleging that the provision violated Sections 303(a)(1) and (3) of the Social Security Act and that the statute was irrational and had no valid public purpose in violation of the due process and equal protection clauses of the Fourteenth Amendment. A three-judge district court held that the statute was unconstitutional. 408 F.Supp. 1016 (1976).

The Supreme Court reversed in an opinion by Justice Blackmun. The Court rejected Hodory's argument that the Social Security Act was intended to provide for unemployment compensation for all workers involuntarily unemployed, saying that the act contemplated that the states would create waiting periods, benefit rates, and maximum-benefit periods and that the benefits would not be granted immediately or indefinitely.

On the constitutional question, the Court said that the Ohio statute "does not involve any discernible fundamental interest or affect with particularity any protected class." "The employer's costs go up with every laid-off worker who is qualified to collect unemployment," the Court pointed out. "The only way for the employer to stop these rising costs is to settle the strike so as to return the employees to work. Qualification for unemployment compensation thus acts as a lever increasing the pressures on an employer to settle a strike. The State has chosen to leave this lever in existence for situations in which the employer has locked out his employees, but to eliminate it if the union has made the strike move. Regardless of our views of the wisdom or lack of wisdom of this form of state 'neutrality' in labor disputes, we cannot say that the approach taken by Ohio is irrational."

Justice Rehnquist did not participate in the case.

No Hearing Required for Removal of Foster Children

In *Smith v. Organization of Foster Families*, 431 U.S.___, 53 L.Ed. 2d 14, 97 S. Ct. 232, 45 U.S.L.W. 4638, decided June 13, the Court reversed a ruling by a three-judge district court that children living in foster homes could not be removed from them without a hearing, either to another foster home or to the home of their natural parents.

The decision applied to several cases that arose when New York authorities sought to remove children from foster homes where they had lived for some time. The suit was brought by an organization of foster parents and a number of individual foster parents seeking declaratory and injunctive relief, alleging that the state procedures for removing children from foster homes violated the due process and equal protection clauses of the Fourteenth Amendment. The district court agreed, and four separate appeals were taken. See 418 F.Supp. 277 (1976).

A unanimous Supreme Court reversed, speaking through Justice Brennan. The Court pointed out that the expressed principle of New York's foster placement system is that placement of a child in foster care is a "temporary, transitional action" whose goal is to return the child to his natural parents as soon as possible, or, if such a reunion is impossible, to place the child in a new home with adoptive parents.

The Court rejected the foster parents' assertion that they had a constitutionally protected interest—a "right of family privacy" in the words of the district court—in the integrity of their family unit. The alleged state interference here was with a relationship that was created by state law and contractual arrangements, the Court pointed out. A second consideration was that "ordinarily procedural protection may be afforded to a liberty interest of one person without derogating from the substantive liberty of another," the Court said. "Here, however, such a tension is virtually unavoidable. Under New York law, the natural parent of a foster child in voluntary placement has an absolute right to the return of his child in the absence of a court order obtainable only upon compliance with rigorous substantive and procedural standards, which reflects the constitutional protection accorded the natural family."

It was, the Court said, difficult to reconcile the "liberty interest in the foster family relationship claimed by appellees" with the rights of the natural family.

The Court did not actually decide the question of the foster parents' rights, however, instead holding that the district court erred in determining that the New York procedures for removal of children from foster homes were constitutionally defective.

Justice Stewart, joined by the chief justice and Justice Rehnquist, wrote a concurring opinion that declared that it was unnecessary to decide the cases "on the assumption that either foster parents or foster children in New York have some sort of 'liberty' interest in the continuation of their relationship. Rather than tiptoeing around this central issue, I would squarely hold that the interests asserted by the appellees are not of a kind that the Due Process Clause of the Fourteenth Amendment protects." Justice Stewart added, "Clearly, New York has deprived nobody of his life in these cases. It seems to me just as clear that the State has deprived nobody of his liberty or property. Putting to one side the District Court's erroneous 'grievous loss' analysis, the appellees are left with very little ground on which to stand."

No Statute of Limitations for E.E.O.C. Suit

In *Occidental Life Insurance Company v. Equal Employment Opportunity Commission*, 432 U.S.___, 53 L.Ed. 2d 402, 97 S.Ct. 2447, 45 U.S.L.W. 4752, decided June 20, the Court held that the 1972 amendments to the Civil Rights Act of 1964 impose no limitations on the time in which the Equal Employment Opportunity Commission may bring suit on behalf of an injured private party. The decision also held that state limitations periods are not applicable.

In 1970, an employee of the Occidental Life Insurance Company complained to the commission that the company had discriminated against her because of her sex. After investigation the commission tried reconciliation discussions with the company, but these proved to be futile. On February 22, 1974, the commission brought this enforcement action. The district court granted the company's motion for summary judgment on the ground that the law requires that an enforcement action be brought within 180 days of the filing of the

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charge with the commission. The Ninth Circuit reversed. 535 F. 2d 533 (1976).

The Supreme Court affirmed in an opinion by Justice Stewart. The Court pointed out that "neither § 706(f) nor any other section of the Act explicitly requires the EEOC to conclude its conciliation efforts and bring an enforcement suit within any maximum period of time."

On its face, the Court continued, Section 706(f)(1) provides little support for the argument that the 180-day provision is a statute of limitations. "Rather than limiting action by the EEOC, the provision seems clearly addressed to an alternative enforcement procedure: If a complainant is dissatisfied with the progress the EEOC is making on his or her charge of employment discrimination, he or she may elect to circumvent the EEOC procedures and seek relief through a private enforcement action in a district court." This view of the act was supported by the legislative history, the Court concluded after examining the relevant documents.

In refusing to hold that the state limitations period applied, the Court said that, while it is generally true that state limitations periods are presumed to apply when Congress has not specified any in federal legislation, this rule is not to be applied mechanically. "State legislatures do not devise their limitations periods with national interests in mind, and it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies," the Court said.

"In view of the federal policy requiring employment discrimination claims to be investigated by the EEOC and, whenever possible, administratively resolved before suit is brought in a federal court, it is hardly appropriate to rely on the 'State's wisdom in setting a limit . . . on the prosecution. . . . ' For the 'State's wisdom' in establishing a general limitation period could not have taken into account the decision of Congress to delay judicial action while the EEOC performs its administrative responsibilities."

Justice Rehnquist, joined by the chief justice, dissented on the ground that the state limitations period should have been applied. The Court's assertions were made out of whole cloth, the dissent stated. "This Court has long followed the rule that, unless the United States was suing in its sovereign capacity, 'in the absence of any provision of the act of Congress creating the liability, fixing a limitation of time for the commencement of actions to enforce it, the statute of limitations of the particular State is applicable.' "

Court-Ordered Redistricting Violates One Man, One Vote

In *Connor v. Finch*, 431 U.S. ___, 52 L.Ed. 2d 465, 97 S. Ct. 1828, 45 U.S.L.W. 4528, decided May 31, the Court held that a court-ordered reapportionment plan for the Mississippi legislature violated the requirement of the equal protection clause that legislative districts be "as nearly of equal population as is practicable."

The reapportionment plan was the sixth to be held unconstitutional in the course of twelve years of litigation. In devising the plan, the district court for the Southern District of Mississippi announced four guidelines: population variances were to be as "near de *minimis* as possible"; districts were to be reasonably contiguous and compact; Negro voting strength would not be minimized or canceled; and every effort would be made to maintain the integrity of county lines.

The plaintiffs challenged the plan, arguing that the district court had failed to abide by its announced criteria.

In reversing and remanding, Justice Stewart, speaking for the Supreme Court, said that its earlier decisions had made it clear that a court will be held to stricter standards in devising legislative reapportionment plans than will a state legislature: "[U]nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, must ordinarily achieve the goal of population equality with little more than de *minimis* variation," the Court declared.

The district court's plan contained a maximum deviation from population equality of 16.5 per cent for the senate and 19.3 per cent for the house. "Such substantial deviations from population equality simply cannot be tolerated in a court-ordered plan," the Court declared. The deviations "substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments." The Court suggested that the policy against breaking county lines was "virtually impossible of accomplishment in a State where population is unevenly distributed among 82 counties, from which 52 Senators and 122 House members are to be elected," and it "must inevitably collide with the basic Equal Protection standard of one person, one vote."

The Court also noted that the policy against fragmenting counties was "insufficient to overcome the strong preference for single-member districting" that the Court had announced at an earlier stage of this litigation.

While the Court did not reach the claim that the plan in some districts impermissibly diluted black voting strength, but it did state that in making a new plan the district court "should either draw legislative districts that are reasonably contiguous and compact, so as to put to rest suspicions that Negro voting strength is being impermissibly diluted, or explain precisely why in a particular instance that goal cannot be accomplished."

Justice Blackmun, joined by the chief justice, wrote a concurring opinion that expressed his view that the Court had not disapproved the district court's use of county lines as district boundaries whenever possible "even though this policy may cause a greater variation in district population than would otherwise be appropriate for a court-ordered plan." He disagreed with the Court's approach to the racial dilution issue, saying that instead of considering isolated aspects of a state-wide plan, the "overall effect of the plan on the opportunity for fair representation of minority voters" should be considered.

Justice Powell dissented, taking the position that it was "unnecessary and erroneous" to strike down the entire plan. He said that the theory underlying the more demanding standard of review for court-ordered plans was that legislative plans are more likely to reflect a state's political policy. "Where the deviations in a court's plan are attributable, as in this case, to an explicit policy of deference to the State's traditional district lines, the distinction becomes relatively unimportant."

He declared that there was no evidence in the record to suggest that the over-all effect of the plan was to dilute black voting power, and he contended that the remand should be limited to a review of specific districts as to which questions had been raised.

Justice Rehnquist abstained.

Voting Rights Act Precludes Judicial Review

In *Morris v. Gressette*, 432 U.S.___, 53 L.Ed. 2d 506, 97 S.Ct. 2411, 45 U.S.L.W. 4773, decided June 20, the Court held that there was no provision for judicial

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review of the attorney general's failure to interpose a timely objection under Section 5 of the Voting Rights Act to a change in the voting laws of a jurisdiction subject to the act.

Section 5 forbids states subject to the act to implement any change in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without either obtaining a declaratory judgment from the District Court for the District of Columbia that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color," or submitting the change to the attorney general and receiving no objection within sixty days.

The case involved two reapportionment plans for the South Carolina senate. The first plan was submitted to the attorney general. While he had it under consideration, a three-judge federal court for the District of South Carolina was convened to consider several suits that attacked the plan on the ground that it violated the Fourteenth and Fifteenth amendments. The court rejected the Fifteenth Amendment objection, but ruled that the plan violated the Fourteenth because of malapportionment. The attorney general meanwhile had entered an objection to it. The state enacted a new reapportionment plan on May 6, 1972, which was submitted to both the district court and the attorney general. On May 23, the court found the plan constitutional. On June 30, the attorney general notified state authorities that he would not object to the second plan because he felt "constrained to defer to the . . . determination of the three-judge District Court."

Several of the plaintiffs then brought suit in the District of Columbia, challenging the attorney general's failure to interpose an objection. Almost a year later, that court ordered the attorney general to make a decision "in accordance with his statutory responsibility." The attorney general eventually did interpose an objection, and the District of Columbia Circuit affirmed. 520 F. 2d 53 (1975). Two South Carolina voters then filed this suit in the District of South Carolina seeking an injunction against implementation of the second reapportionment act. The three-judge court convened to hear the case dismissed, holding that the requirements of Section 5 of the Voting Rights Act were satisfied when the attorney general failed to interpose an objection within sixty days after the second plan was submitted to him.

The Supreme Court affirmed, speaking through Justice Powell. The Court pointed out that Section 5 is an "unusual" and "severe" procedure, and it said that the legislative history indicates that the submission of a plan to the attorney general was intended to provide "a speedy alternative method of compliance to covered States." "The congressional intent is plain," the Court said, "the extraordinary remedy of postponing the implementation of validly enacted state legislation was to come to an end when the Attorney General failed to interpose a timely objection based on a complete submission. . . . Since judicial review of the Attorney General's actions would unavoidably extend this period, it is necessarily precluded."

The Court pointed out that its decision was "reinforced" by the fact that the attorney general's failure to act is not conclusive as to the constitutionality of the legislation submitted to him.

Justice Marshall, joined by Justice Brennan, dissented, saying that "the majority puts aside both common sense and legal analysis, relying instead on fiat." The Voting Rights Act does not explicitly preclude judicial review of the attorney general's actions, the dissent argued, and in the absence of such a provision, the appellees have "the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review" of his decision. The "strong presumption" was strengthened by the provision in Section 4 of the act which does expressly prohibit judicial review of the attorney general's determinations under that section. "If the Congress that wrote § 4 had also intended to preclude review of the same officer's actions under § 5, it would certainly have said so," the dissent argued.

Justice Blackmun noted that he dissented for the reasons stated by the court of appeals in its earlier decision in the litigation.

Section 4 of Voting Rights Act Means What It Says

In *Briscoe* v. *Bell*, 432 U.S.___, 53 L.Ed. 2d 439, 97 S.Ct. 2428, 45 U.S.L.W. 4765, decided June 20, the Court held that Section 4(b) of the Voting Rights Act of 1965, which provides that a determination by the attorney general that a state is covered by the act "shall not be reviewable in any court," means exactly what it says. A district court, with the District of Columbia Circuit agreeing, had held that it had limited jurisdiction to consider "the pure legal question" whether the attorney general had correctly interpreted the statute.

The attorney general had ruled that Texas came under the 1975 amendment to the act which is concerned with "voting discrimination against citizens of language minorities" because of the used "English-only" elections in spite of its large Spanish-speaking population.

Texas officials brought suit seeking declaratory and injunctive relief from the attorney general's ruling. The district court granted summary judgment for the attorney general, and the District of Columbia Circuit affirmed. 535 F. 2d 1259 (1976).

The Supreme Court vacated the judgment and remanded in a unanimous opinion by Justice Marshall. The Court held that the lower courts erred in finding that they had jurisdiction.

The Court pointed to the statutory provision that "a determination or certification of the Attorney General . . . under this section . . . shall not be reviewable in any court and shall be effective upon publication in the *Federal Register*."

"The language is absolute on its face and would appear to admit of no exceptions," the Court declared. "The purposes and legislative history of the Act strongly support this straightforward interpretation."

Court's Summary Affirmance Is Not Necessarily Precedent

Mandel v. *Bradley*, 432 U.S.___, 53 L.Ed. 2d 199, 97 S. Ct. 2238, 45 U.S.L.W. 4701, decided June 16, was a per *curiam* decision that vacated the judgment and remanded a case in which a three-judge district court had held unconstitutional a Maryland provision that requires candidates running as independents to file nominating petitions signed by 3 per cent of the registered voters at least seventy days before the primary elections. Candidates who run in the primary need only file a certificate of candidacy.

A three-judge district court held that provision invalid, citing *Tucker* v. *Salera*, 424 U.S. 959 (1976), a case involving a Pennsylvania statute that required independent candidates to gather signatures of 2 per cent of the voters within a twenty-one day period 244 days before the general election. A three-judge court had held the Pennsylvania provision unconstitutional because of the early filing date. The Supreme Court had affirmed summarily.

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In the present case, the Court said that the district court had erred in believing that the *Salera* affirmance adopted the reasoning as well as the judgment of the lower court. The Court cited *Hicks* v. *Miranda*, 422 U.S. 322 (1975), which held that lower courts are bound by summary actions on the merits by the Supreme Court, but warned that "[a]scertaining the reach and content of summary actions may present issues of real substance."

In *Salera*, the Court explained, the "combination of an early filing date and the 21-day limitation on signature gathering is sufficient to distinguish [it] from the case now before us, where there is no limitation on the period within which such signatures must be gathered. In short, *Salera* did not mandate the result reached by the District Court in this case."

Justice Brennan wrote a concurring opinion to "emphasize the Court's treatment of the rule announced in *Hicks* v. *Miranda*. . . ." After today, he said, "judges of the state and federal systems are on notice that, before deciding a case on the authority of a summary disposition by this Court in another case, they must (a) examine the jurisdictional statement in the earlier case to be certain that the constitutional questions presented were the same and, if they were, (b) determine that the judgment in fact rests upon decision of those questions and not even arguably upon some alternative nonconstitutional ground."

Justices White and Powell concurred on the ground that the district court might have invalidated the Maryland law on grounds similar to those employed in *Salera*, which would make a remand inappropriate, and that it was "fairly arguable that the District Court should unmistakably record its opinion as to the validity of the Maryland law."

Justice Stevens dissented, taking the view that the Maryland statute unfairly discriminates against independent candidates because of the earlier filing date.

Servicemen Entitled to Re-enlistment Bonuses

United States v. *Larionoff*, 431 U.S. ___, 53 L.Ed. 2d 48, 97 S.Ct. 2150, 45 U.S.L.W. 4650, decided June 13, affirmed lower court holdings that servicemen who agreed to extend their enlistments at a time when they were entitled to a special re-enlistment bonus were entitled to the bonuses even though the authority for granting the bonus had been terminated at the time the bonuses fell due.

The decision involved the bonus rights of six sailors, including Larionoff, whose case was typical of all of them. Shortly after he enlisted in 1969, he enrolled in a special training program that would qualify him as "Communications Technician—Maintenance." At that time that rating was a "critical military skill," and he was eligible for a variable re-enlistment bonus (V.R.B.) that was four times the amount of the regular re-enlistment bonus. Upon enrolling in the program he extended his enlistment by six years. He completed the program in 1973, but by that time communications technicians were no longer on the list of critical military skills, and the navy refused to pay the V.R.B.

The district court granted summary judgment for Larionoff, and the District of Columbia Circuit affirmed. 533 F. 2d 1167 (1976).

The Supreme Court affirmed in an opinion by Justice Brennan. The Court noted that both the government and the respondents agreed that the sailors' entitlements were dependent upon statutory rights rather than ordinary contract principles, and it agreed that the regulations favored the government's position. The Court reversed, however, because it found that the regulations were contrary to the purposes of Congress in enacting the variable re-enlistment bonus provisions. The plan was to induce selected service personnel to extend their period of service beyond their initial enlistments, thus making it possible to retain them as members of the service and avoid the cost of training new personnel as replacements, the Court said. The V.R.B. would be effective as an incentive to re-enlist only "if at the time he made his decision the service member could count on receiving it if he elected to remain in service," the Court said. "The clear intention of Congress to enact a program that 'concentrates monetary rewards at the first re-enlistment decision point where the greatest returns per retention dollar can be expected," the Court went on, "could only be effectuated if the enlisted member at the decision point had some certainty about the incentive being offered. Instead, the challenged regulations provided for a virtual lottery."

Justice White, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, dissented on the ground that the legislation was not part of the re-enlistment agreement and that the servicemen had no vested right in the bonuses.

Association of Legal Assistants to Sponsor Regional Seminars

THE NATIONAL Association of Legal Assistants will hold its third annual series of regional seminars for legal assistants for 1977–78 as follows: November 4–5, Phoenix; November 11–12, Minneapolis; January 20–21, San Diego; February 10–11, Albany; February 17–18, Atlanta; March 3–4, Des Moines; March 10–11, Alexandria.

Topics will be the analysis of procedures in complex litigation, legal and tax aspects of estate planning for the businessman, malpractice crisis, Uniform Marriage and Divorce Act, and federal Freedom of Information Act. The registration fee is $30 for N.A.L.A. members; $50 for nonmembers.

Further information may be obtained from Mrs. Mary Ellen Buehring, 3005 East Skelly Drive, Suite 122, Tulsa, Oklahoma 74105.

1978 Ross Essay Contest

The 1978 Ross Essay contest, conducted under the provisions of the will of Erskine Mayo Ross, will be administered and judged by the Board of Editors of the *American Bar Association Journal*. Eligibility for the contest is confined to members of the American Bar Association, including the Law Student Division. The prize stipend is $5,000.

The general subject matter for the 1978 contest is discrimination and the law. Contestants will not be expected to write on all aspects of this general subject but are free to choose particular aspects of the topic—for instance, discrimination against a particular group on account of race, sex, age, or the like; so-called reverse discrimination in favor of a group; factual discrimination between rich and poor; or discrimination by failure to distinguish between unlike groups. Contestants are also free to direct their attention to particular areas in which discrimination may be found—for instance, education, employment, or taxation.

Essays must be submitted on or before April 1, 1978, and may not exceed 5,000 words. Footnotes should be used sparingly, if at all, and must be included within the word limitation.

Further information and entry forms may be obtained from Ross Essay Competition, American Bar Association Journal, 77 South Wacker Drive, Chicago, Illinois 60606.

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Olive G. Ricker
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OLIVE Graham Ricker, who was executive secretary of the American Bar Association from 1927 to 1952, died quietly in her sleep early in the morning of Wednesday, September 7. She was ninety-two.

She was the Association's only executive secretary, and this is fitting because she was a unique woman who occupies a unique place in the history of the Association that she served so faithfully for twenty-eight years.

Born in London Grove, Pennsylvania, on June 30, 1885, she grew up in Pennsylvania and was graduated from the Goldie Business College in Wilmington, Delaware, in 1901. Her unusually fine penmanship got her a job copying legal documents for insurance companies at $3.50 a week in Philadelphia, where she met her husband.

After a few years as a ranch wife in the Bitter Root Valley of Montana, she became secretary for a Missoula lawyer, and, in one way or another, the rest of her career was spent in association with lawyers.

In 1918 she went to Baltimore where she worked for the United States Fidelity and Guaranty Company. In 1924 she was hired by William C. Coleman, the secretary of the American Bar Association, to work for the Association in his office. In those days, its business affairs were carried on in the law offices of the secretary and the treasurer.

In 1927 the Association had grown to more than 26,000 members, and it was decided to place its management in a central office under the direction of an executive secretary. The Executive Committee—the predecessor of the Board of Governors—chose Olive Ricker for that position. The new office was established in Chicago, where the *American Bar Association Journal* already had an office.

The Executive Committee's choice was felicitous. For the next quarter of a century, Olive Ricker was a key figure in the work of the American Bar Association, a period in which the organization grew in size and prestige. The Association had 26,246 members in 1927 when she became its chief administrative officer. It had grown to 48,108, nearly double, when she retired at the end of the 1952 annual meeting in San Francisco. When she took charge of the office in Chicago in 1927, the Association had only three employees, including the managing editor of the *Journal*. As the organization grew, she developed a highly trained, efficient staff that numbered more than fifty when she retired. One of her finest efforts was directing the staff in handling the details of the Association's campaign against the Supreme Court packing proposal in 1937. She worked with all the presidents of the Association from Charles Evans Hughes (1924–25) to Howard L. Barkdull (1951–52), a total of twenty-nine.

At a time when women executives were rare, Olive Ricker demonstrated that women in positions of leadership can be as tough and as insistent as any man. She had the other virtues of good executives too—fairness, integrity, reliability, determination, and courage.

Those who knew her and who worked with her, however, will remember her more as a warm and revered friend. She worked with leaders of the legal profession, important judges, legal scholars, men who sat on the boards of directors of the nation's largest companies, but she remained in many ways the down-to-earth woman who had made a home on a Montana ranch. Her common sense and humor endeared her alike to the lawyers for whom she worked and to those who served under her.

During most of her tenure, the offices of the Association were located in an old Victorian mansion at Elm and Dearborn in Chicago. It was a place that fitted her. Her office was in what had been the dining room—a large, comfortable room with wood paneling whose windows looked out on a tree-lined street. Her desk, an old fashioned mahogany piece with a glass top, was placed so that she sat with her back to an elaborate fireplace. The desk, like her mind, was orderly. From this room she corresponded with prominent lawyers throughout the country, signing the letters in green ink in her fine handwriting. Famous men came here to see and visit with her. Conferences were held here that shaped not only the policies of the Association but also the nation.

When it was necessary to work late, which was often, it was not unusual for her to take one or two fellow workers home to her apartment a block down the street for a drink and a home-cooked meal, including, if they were lucky, her spoon bread.

After she retired, she returned to Baltimore, where she continued to devote her time to the legal profession by helping in the reorganization of the legal aid program there.

She is survived by her son, Gordon, of Milford, Delaware, a grandaughter, and four great-grandchildren. Contributions in her memory may be made to the Church School, Box S, Paoli, Pennsylvania 19301.

Life is not always fair, and it was not fair to Olive Ricker in her last years, for illness and old age kept her bedridden, and many of her friends were gone. She has joined them now, but her contributions to the American Bar Association have left all of us in her debt.

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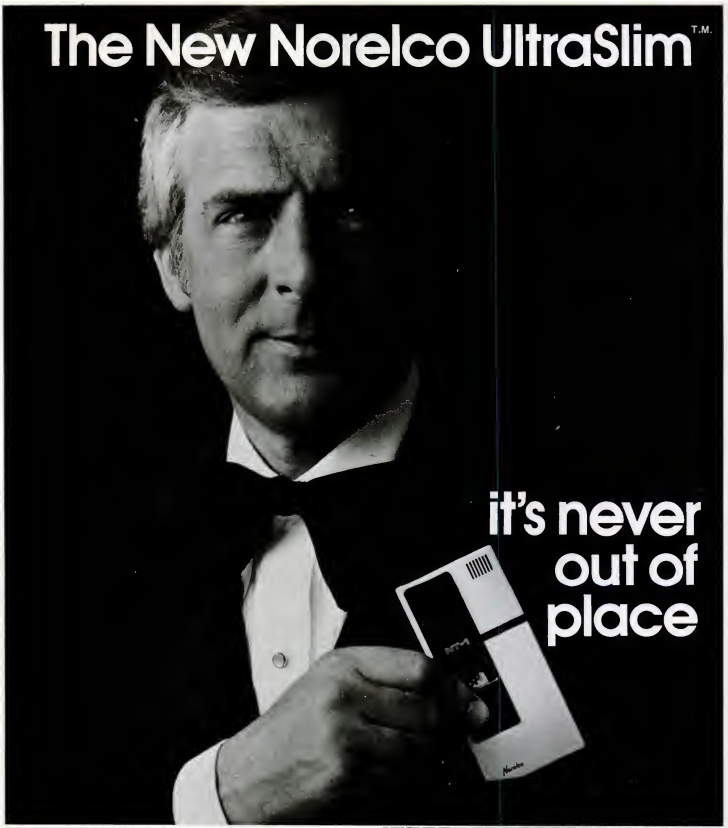

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by Allan Ashman

Administrative Searches . . . warrantless inspections

A warrantless inspection as authorized by Alaska's Occupational Safety and Health Act has been ruled unconstitutional by that state's supreme court. The court concluded that private business premises are protected by the provision of the Alaska Constitution that the "right of the people to be secure in their persons, houses, and other property, papers, and effects, against unreasonable searches and seizures, shall not be violated." The court also relied on the state constitution's provision: "The right of the people to privacy is recognized and shall not be infringed."

Justice Rabinowitz, writing for the court, pointed out that the Alaska Constitution contains a broader guarantee against unreasonable searches and seizures than does the United States Constitution and that any doubt as to whether business premises are included within the guarantee is answered by the inclusion of the phrase "and other property."

Like the Supreme Court of the United States in *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), the Alaska court pointed out that it had "repeatedly enforced Alaska's constitutional preference for search warrants and has taken the view that except in certain carefully defined circumstances, warrantless searches [are] per se unreasonable in the constitutional sense." The court continued: "Since violations of Alaska's O.S.H.A. can result in significant fines and imprisonment, we think the self-protection and privacy interests, found determinative in *Camara*, of the owner of business premises is deserving of, although not equivalent to, the significant constitutional solicitude and protection afforded Alaska's citizens in criminal prosecutions."

Justice Rabinowitz believed that broad statutory safeguards are inadequate substitutes for individualized judicial review of applications for search warrants. Without judicial review, he said, "far too much discretion is lodged in the official in the field." Although the court acknowledged the "public interest in preventing injuries and illnesses of employees arising out of work situations is a significant one, yet we are persuaded that authority to inspect and search one's business premises (the Alaska O.S.H.A. applies to every employer who had one or more employees) should be evidenced by a warrant." The court concluded that the burden of obtaining a warrant was not likely to frustrate the purpose of O.S.H.A. inspections.

In these cases, the court observed, it is necessary to balance the need for the administrative search against the invasion of privacy the search entails. The court specifically endorsed the Supreme Court's conclusion in *Camara* "that the requisite showing necessary to obtain a warrant for an administrative search is one of attenuated probable cause and that this standard is both reasonable and constitutionally permissible."

Chief Justice Boochever concurred with a separate opinion. He felt the Alaska court was bound by the United States Supreme Court's decision in *See v. City of Seattle*, 387 U.S. 541 (1967), in which it was held that the Fourth Amendment bars the prosecution of a property owner who refused to permit a warrantless fire safety code inspection of a commercial warehouse. Were he writing on a fresh slate, he said, he would construe the Alaska constitutional provisions as protecting against a warrantless O.S.H.A. search in a home but not in factories or commercial premises.

(*Woods and Rohde, Inc.* v. *Alaska*, June 2, 1977, 565 P. 2d 138.)

Attorney's Fees . . . prelitigation services

This case raised the question whether *Hall* v. *Cole*, 412 U.S. 1 (1973), should be interpreted to permit the allowance of an attorney's fee for prelitigation services in connection with a union member's claim later asserted in a suit under Section 102 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 412, when it is necessary for the plaintiff to retain counsel but not to file suit in order to vindicate his protected right. The Court of Appeals for the Seventh Circuit ruled that attorney's fees were not allowable.

A member of the Steelworkers union, Michael Mezo, published an article in a union newspaper criticizing expenditures of local union funds. The president of the local union responded by filing charges against Mezo under the local's bylaws, asserting that Mezo had committed "a breach of trust and willingly, deliberately, and knowingly made the false and libelous statements that appeared under his name in" the article. Pursuant to the bylaws, a local union trial committee held a hearing on the charges.

After the committee's hearing and before it had made findings or recommendations, the district director of the international union wrote to the international's general counsel about the charges against Mezo. The general counsel advised the director by telephone that "there would be no harm coming to Mr. Mezo by reason of these charges," but apparently the word was not relayed to Mezo, who retained an attorney. During subsequent meetings, Mezo's attorney was advised that the meeting at which the charges were to be presented had been cancelled and that the charges would not be prosecuted. Nevertheless, Mezo's attorney filed this action.

The district court ruled that the case was moot except for the fee issue and heard evidence relating to the necessity for retaining an attorney and bringing the action. Finding "that it was unnecessary for plaintiff to commence this action after plaintiff's counsel was given assurances that no action would be taken against the plaintiff but that it was necessary for plaintiff to retain the services of an attorney to vindicate his right of free speech," the court allowed a fee based on the time spent "in repre-

senting [Mezo] prior to the filing of the instant complaint."

In *Hall* a claim of violation of Section 102 similar to Mezo's was prosecuted to a judgment favorable to the plaintiff, which included an attorney's fees. The Court said in *Hall* that "by vindicating his own right, the successful litigant dispels the 'chill' cast upon the rights of others." "Such lawsuits [can] contribute to the preservation of union democracy," the Court continued, and thus have a beneficial effect on the union's future operation. The award of an attorney's fee "simply shifts the costs of litigation" to the union members, who would have had to pay the fees if they had brought the suit.

Concluding that a fee was not allowable here, Judge Tone accepted as not clearly erroneous the district court's finding that it was not necessary to file this action in order to vindicate Mezo's right. *Hall* repeatedly refers to the existence of litigation as the basis for the exercise of the court's equitable power to award fees. Judge Tone believed that it would be an unwarranted extension of *Hall* to use the existence of litigation that was not necessary as a vehicle for the allowance of an attorney's fee. "If the litigation had not been filed," he concluded, "there would have been no arguable basis for an award of fees by a court of equity. The filing of unnecessary litigation can hardly supply the missing authority."

(Mezo v. *International Union, United Steelworkers of America*, July 6, 1977, 558 F.2d 1280.)

Intercollegiate Athletics . . . due process

Just before the whistle blew for the last college basketball season, the United States District Court for the District of Minnesota sent in three University of Minnesota players who had been benched by the National Collegiate Athletic Association. But the United States Court of Appeals for the Eighth Circuit has ordered them back to the locker room.

The district court had ruled that when the N.C.A.A., of which Minnesota is a member, placed the entire Minnesota athletic program on an indefinite probation because of the university's refusal to declare the three players ineligible, it transgressed the university's legal duty to give the players due process hearings and to abide by the results of the hearings (422 F.Supp. 1158; 63 A.B.A.J. 710). Acting under its own student conduct code, the university had given the players hearings before two committees, which found they had not violated the eligibility rules, as the N.C.A.A. contended. The district court concluded that both the university and the N.C.A.A. were bound by the committees' rulings and that the university could not disavow them in order to comply with its membership obligation to abide by the N.C.A.A.'s rules and decisions. To do so, the court added, would make a mockery of due process.

Writing for himself and Judge Webster, Judge Van Oosterhout did not agree. The court held that the university had not demonstrated a substantial likelihood of success on the merits and that the district court erred in granting the university a preliminary injuction. The court concluded that the university "could have declared each of the three student-athletes ineligible consistently with any constitutional duty it may have owed them and, conversely stated, without violating any due process rights held by them. With this conclusion, the entirety of the university's unconstitutional interference claim necessarily falls," for it followed almost immediately that the university's contractual obligation to declare the student-athletes ineligible was not subject to any superior constitutional obligation and the sanctions imposed by the N.C.A.A. were a legitimate consequence of its rules established by contract and unimpaired by the Constitution. The Eighth Circuit believed that it didn't have to decide whether the three athletes had a property interest in intercollegiate basketball participation or a liberty interest in their good names, or both, sufficient to invoke the guarantees of due process, as found by the district court.

Judge Van Oosterhout acknowledged that the court's decision leaves the N.C.A.A. member institutions with the "sometimes delicate task of declaring individuals ineligible when facts are found which reasonably reflect proscribed conduct and with not declaring them ineligible when such facts are not found. We cannot say that this task would always be an easy one, nor can we deny that the member institution will

Top of the Month

● In a suit brought by an Orthodox Jewish prisoner, a federal district court has ruled that a "no beard" rule is unconstitutional as applied to prisoners who declined to remove their beards because of sincerely held religious beliefs. *Moskowitz* v. *Wilkinson*, 432 F. Supp. 947.

● A former United States senator from Maryland, Daniel Brewster, has escaped professional discipline as a lawyer based on his federal conviction of accepting an illegal gratuity in violation of 18 U.S.C. § 201(g). The Maryland Attorney Grievance Commission charged him with the conviction but did not develop any of the underlying circumstances of the commission of the offense. The Maryland Court of Appeals held that the offense was not one involving moral turpitude, although so alleged in the commission's petition, and it dismissed the proceeding. *Attorney Grievance Commission* v. *Brewster*, 374 A. 2d 602.

● The Supreme Court of Delaware has ruled that its justice of the peace court system does not violate the due process clause of the Fourteenth Amendment by authorizing nonlawyers to preside over criminal proceedings involving charges that might result in incarceration. The court emphasized that a defendant need only say he wants to bypass the J.P. court and appear in a court with a lawyer-judge. *Shoemaker* v. *Delaware*, 375 A. 2d 431.

● Colleges that have suffered student loan defaults and discharge of the indebtedness through the students' bankruptcies have a hidden weapon. It's O.K., the Eighth Circuit ruled, for those colleges to refuse to give the former students transcripts of their credits. Bankruptcy discharge does not preclude this action. *Girardier* v. *Webster College*, No. 76-1922, 8/24/77.

● In a wrongful death action, the Nebraska Supreme Court has ruled that the results of a blood alcohol test of the defendant, taken shortly after the automobile accident in which the decedent was killed, were inadmissible. The court held that the test results were within the physician-patient privilege. *Branch* v. *Wilkinson*, 256 N.W. 2d 307.

● In a scholarly consideration of the law of trespassing children, the federal district court in the District of Columbia has taken away a $608,000 jury verdict awarded to a nine-year-old boy who sustained a serious leg injury while attempting to "hop" a railroad car. Judge Oliver Gasch found the railroad not liable under the criteria of Section 339 of the *Restatement (Second) of Torts*. *Alston* v. *Baltimore and Ohio Railroad Company*, 433 F.Supp. 553.

occasionally find itself in a position where fairness to the individual and adherence to contractual obligations might seemingly conflict." On the other hand, he emphasized that the N.C.A.A. sought to vindicate its own authority to interpret its own rules, "an authority which we agree is of the utmost importance to the execution of the association's salutary goals." In addition, the court did not view the association's dealings with the university as unduly harsh or abusive.

Judge Bright, the third member of the Eighth Circuit panel, concurred separately, noting that he had "some doubt that the activities of the N.C.A.A. constitute 'state action,' " but that he bowed to the decisions of four other circuits that have held them so because of the large number of public institutions that are N.C.A.A. members.

(*Regents of the University of Minnesota* v. *National Collegiate Athletic Association*, August 2, 1977, No. 77-1028.)

Judges . . . disqualification

In a case of first impression under the federal judiciary disqualification statute as strengthened in 1974, the United States Court of Appeals for the Seventh Circuit has ruled that a judge's disqualification is mandatory if his brother's law firm appears in a case before him. Since the district judge's disqualification in this case was required under the statute, his failure to recuse himself was an abuse of discretion, and the Seventh Circuit directed the issuance of a writ of mandamus to the district judge.

The question of the right of Judge Robert D. Morgan of the Southern District of Illinois to sit was raised by a plaintiff in a civil suit in which the defendant was represented by the law firm of which the judge's brother is a member and in which the judge practiced before he went on the bench. Without a hearing, the judge denied the plaintiff's motion that he disqualify himself but filed a "memorandum of decision" in which he found after "specific inquiry" that his brother was not acting as an attorney in the case. This led the Seventh Circuit to remark that since it was apparent that the "specific inquiry" must have been made ex parte by Judge Morgan to his brother, "the judge's inquiry creates an impression of private consultation and appearance of partiality which does not reassure a public already skeptical of

lawyers and the legal system."

The major question in the case was whether the statute, 28 U.S.C. § 455, required mandatory disqualification. It provides that a judge (a) "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned. (b) He shall also disqualify himself in the following circumstances . . . . (5) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:. . . . (ii) is acting as a lawyer in the proceeding; (iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceedings."

The court pointed out that Congress enacted the new Section 455 in 1974 in order to reconcile the 1972 Code of Judicial Conduct with the federal statutes. Its purpose was to eliminate "dual standards, statutory and ethical, couched in uncertain language, that had the effect of forcing a judge to decide either the legal or ethical issue at his peril." According to the court, Congress also intended to overrule the concept that close cases should be resolved on the ground that a judge had a "duty to sit." The new statute, the court emphasized, contains the general, all-inclusive objective standard of the 1972 code: a judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." In addition, various subsections provide for the mandatory disqualification of a judge in certain specific circumstances, such as where family or financial interests are involved.

The Seventh Circuit concluded that the judge's brother, Donald A. Morgan, was acting as an attorney by virtue of his relationship with the firm and that he had an interest in the firm that was clearly a financial interest within the statute. The court also found that there was a reasonable basis for finding the appearance of partiality under the facts and circumstances of this case. "This appearance of partiality," the court stated, "begins with the natural assumption that brothers enjoy a close personal and family relationship and, consequently, would be inclined to support each other's interests. When one brother is a lawyer in the firm representing a party before his brother who is the judge in the case, the belief may arise in the public's mind that the brother's firm and its clients will receive favored treatment, even if the brother does not personally appear in the case."

The court's opinion was *per curiam* for a panel consisting of Judges Cummings, Sprecher, and Bauer. A footnote states that because the court's decision "has attributes of the exercise of the supervisory power," the opinion was circulated among the court's judges, but that a majority did not request a hearing en *banc*. Judge Wood did not participate, and Chief Judge Fairchild and Judge Tone voted for an en *banc* hearing.

(*SCA Services, Inc. v. Morgan*, June 17, 1977, 557 F. 2d 110.)

Judicial Discipline . . . retirement for senility

For the first time in American judicial history, a state supreme court justice has been ordered to retire because of senility. A special tribunal of the California Supreme Court, established by that state's constitution and composed of seven intermediate appellate court judges selected by lot, ordered the retirement of Associate Justice Marshall F. McComb.

The California Commission on Judicial Performance, also created by the state's constitution, had recommended after hearings that the eighty-four-year-old jurist be retired or removed. The removal recommendation was based on the commission's findings and conclusions that Justice McComb had willfully and persistently failed to perform his judicial duties and had engaged in conduct prejudicial to the administration of justice that brought the judicial office into disrepute. The special tribunal chose the route of retirement, concurring in the commission's finding that Justice McComb suffered from a disability (chronic brain syndrome, senile dementia) that seriously impaired his ability to perform as a judge and "is, or is likely to become, permanent."

Justice McComb objected to the tribunal's authority to make that determination, contending that a constitutional amendment passed in 1976 setting up the procedure for the special tribunal violated the federal and state prohibitions against ex post facto laws. But the panel rejected this assertion, noting that the amendment was merely a procedural change as distinguished from a change of substantive law. The tribunal also rejected Justice McComb's contentions that impeachment was the only constitutional way that he could be removed from the court and that the proceeding was a "criminal prosecution" in which he was entitled to the same constitutional rights, privileges, and immunities afforded defendants in criminal cases.

He also asserted that he was denied due process and equal protection of the law because two nonlawyers served on the commission. The special tribunal rejected this claim on the ground that the commission was not a court and "rendered no judgment, civil or criminal, and thus could not convict [McComb] of a criminal offense."

(*McComb* v. *Commission on Judicial Performance*, May 2, 1977, 564 P. 2d 1,138 Cal.Rptr. 459.)

Earlier in the proceedings Justice McComb had suffered another judicial reversal—this one in the California Court of Appeal, First District. Presiding Justice Taylor, joined by Judges Kane and Rouse, held that in the proceedings before the commission Justice McComb did not have the privilege afforded to a defendant in a criminal case of refusing to testify. The commission proceedings, Justice Taylor emphasized, were neither criminal nor before "a court of law." Justice McComb could be called on to testify and could refuse only to disclose something that might tend to incriminate him. In view of this, the court concluded that a trial court's order and subpoena directing Justice McComb to appear and testify at a deposition were valid and that disobedience of the order and subpoena was a contempt of the authority of the court.

The court found that the proceedings were analogous to disciplinary proceedings against lawyers and that California law is clear that those are not criminal cases for purposes of the privilege against self-incrimination. The object of the judicial "fitness" proceeding, Justice Taylor stated, "is to protect the public and the litigants before the court from the official ministrations of a judge unfit for high office," not the punishment of the judge.

(*McComb* v. Superior Court, March 15, 1977, 137 Cal.Rptr. 233.)

Limitations . . .
single publication rule

The saga of entertainer Tiny Tim and his wife, Miss Vicki, has been played again—this time in the form of a suit for damages for defamation, personal and professional injury, and invasion of privacy in violation of Sections 50 and 51 of the New York Civil Rights Law. But this chapter ended disastrously for them as the United States District Court for the Southern District of New York dismissed his action on the ground that the suit was filed after the one-year period of the statute of limitations had expired.

The suit was based on an article in the October, 1975, issue of *OUI* entitled "Miss Vicki" and was brought under the New York act, which grants a cause of action for the use "for purposes of trade, [of] the name, portrait, or picture of any living person without having first obtained the written consent of such person." The defendants claimed the single publication rule applied and that the magazine had been distributed by September 7, 1975, whereas the action was commenced September 22, 1976. Tiny Tim, whose real name is Herbert Khaury, contended that the single publication rule did not apply to actions under the New York law but only to defamation. His position was that the defendants had not proved that all 1,779,990 copies of the issue had been sold by September 22, 1975.

It was a case of first impression, and Judge Kevin Thomas Duffy had to find the law as he thought the New York courts would decide it if faced with the issue.

The single publication rule, he observed, is rooted in the "recognition of the vast multiplicity of suits which

could arise from mass publications which transcend a variety of medias [sic] and state lines, and the attendant problems of choice of law, indefinite liability, and endless tolling of the statute of limitations." The rule is aimed, he added, not at particular torts but at the manner in which the tort is executed. "If the wrong arises out of a mass communication," he declared, "then, whether it sounds in defamation or statutory invasion of privacy, the same considerations should apply."

Judge Duffy cited decisions from other courts that supported his position and also pointed out that Section 1 of the Uniform Single Publications Act, which has been adopted in at least eight jurisdictions, applies the rule to invasion of privacy claims founded on mass publications. He concluded that if the New York courts were faced with the issue, they would follow the other decisions and the uniform act.

(*Khaury v. Playboy Publications, Inc.*, April 22, 1977, 430 F.Supp. 1342.)

Right to Counsel . . . child custody

Indigent parents whose children are the subject of a dependency and neglect hearing and subject to removal of custody are entitled to the assistance of counsel under the due process clause of the Fourteenth Amendment unless the right is knowingly waived, according to a decision of the United States District Court for the Western District of Tennessee.

Writing for the court, Judge McRae also concluded that the minimum standards of due process were not met if the trier of fact considered the contents of a report but did not disclose them to the parents.

A Tennessee juvenile court had taken the custody of the parents' four children from them on a finding that the children were dependent and neglected within the meaning of the Tennessee statute. The federal court action arose on a petition for a writ of habeas corpus.

The determination of what procedural safeguards are necessary in a given proceeding, Judge McRae stated, must be evaluated in the light of the nature of the proceeding and the interest affected. He believed that the extent to which procedural due process must be afforded a litigant is influenced by the extent to which the person affected could be "condemned to suffer grievous loss" and depended on whether the person's interest in avoiding that loss outweighed the governmental interest in summary adjudication. The interest being determined in a dependency and neglect hearing, the court observed, is the custody and control of the child. Citing *Stanley* v. *Illinois*, 405 U.S. 645 (1972), Judge McRae emphasized that the United States Supreme Court has long recognized the importance of the family and the right of the parent to raise his child.

The court rejected the contention that due process protection was not required because a neglect proceeding is "nonadversarial" in nature and because the parents' interests are not the principal ones at stake. Judge McRae did acknowledge that the primary interest in this type of proceeding is the welfare of the child, but he concluded that when the petition is filed against parents who have custody of their children and those parents contest the allegations of the petition, that proceeding is "undoubtedly adversarial." Despite their relative infrequency, it is in these proceedings,

Judge McRae suggested, that the parents need the guidance of counsel.

(*Smith v. Edmiston*, March 30, 1977, 431 F.Supp. 941.)

Women's Rights . . . battered wives

New York State Supreme Court Justice Gellinoff has ruled that twelve battered wives have the right to bring suit against the police and courts. Judge Gellinoff found sufficient allegations in the supporting affidavits from seventy-one women to create a factual issue as to whether there was a failure by policemen to give adequate protection and to provide service to battered wives, whether probation officers advise them correctly about how to go about obtaining a protective order, and whether family court clerks are giving proper assistance to wives seeking an immediate petition in the court.

Judge Gellinoff denied motions by the New York City Police Department and probation and family court personnel to dismiss the complaint, which accused them of failing to respond properly or give adequate assistance when women reported being beaten. The complaint, supported by sworn statements in dozens of actual cases, alleged that police officers when called to the scene of a husband's assault on his wife uniformly refuse to take action, even if the physical evidence of the assault is unmistakable and undenied. Rather, the police inform the battered wife that they are unable to render assistance or make an arrest, solely because the victim is the wife of her assailant. The police advise the wife that her only remedy is to obtain an order of protection from the family court.

The complaint further asserted that the probation department employees in charge of the information desks and intake interviews at the various family courts fail to advise battered wives of their right to an immediate petition for an order of protection. Instead, the complaint alleged, they assign conference dates—often weeks or months later—despite the wives' pleas for immediate relief, without advising that the conferences are voluntary and not a prerequisite for an order of protection. The complaint also alleged in essence that family court petition clerks had on several occasions denied petitioning wives timely access to the sitting judge and had abused their discretion in determining whether the wives' complaints were sufficient to warrant preparing a petition.

The complaint sought various forms of declaratory and injunctive relief. The defendants urged summary judgment dismissing the complaint. By a separate motion the plaintiffs also sought to certify a class action.

In denying the defendants' motions to dismiss, Judge Gellinoff noted that for too long Anglo-American law treated a man's physical abuse of his wife as different from any other assault and, indeed, as an acceptable practice. If the allegations of the complaint are true, he observed, only the written law has changed; in reality, wife-beating is still condoned, if not approved, by some of those charged with protecting its victims.

Judge Gellinoff refused, however, to certify a class action. He pointed out that since the action was solely against governmental defendants in their official capacities and sought declaratory and injunctive relief, the designation as a class action was unnecessary.

(*Bruno v. Codd*, July 5, 1977, 396 N.Y.S. 2d 974.)

Institute of Pennsylvania Hospital Sponsors Seminar

A SEMINAR on the modern two-career marriage will be sponsored by the Institute of Pennsylvania Hospital in two cities—New York City on November 5–6 and Palm Beach on December 10–11.

Two couples with special expertise in mental health, as well as personal experience in two-career marriages, will lead the seminar. They are Ellen Berman, director of training and clinical services, Marriage Council of Philadelphia; Perry Berman, associate in psychiatry, University of Pennsylvania; Margaret Baker, lecturer in psychology, Chestnut Hill College; and Howard Baker, associate in psychiatry, University of Pennsylvania.

Further information may be obtained from Heidi E. Kaplan, Department 14NR, New York Management Center, 360 Lexington Avenue, New York, New York 10017 (telephone 212/953-7262). ▲

The Lawyer's Washington

The Legislative Veto: Now You See It, Now You Don't (II)

By Arthur John Keeffe

THE LEGISLATIVE veto, sometimes called the congressional veto, stands the Constitution on its head, according to some critics who believe that it is unconstitutional. What they mean is that under the legislative veto the president or an independent administrative agency proposes what amounts to legislative action, and the Congress has the chance to veto it. And if it does, the president doesn't have a chance to veto the veto because Congress acts by a form of resolution that isn't passed on in the normal course to the president for action.

A lot of people, including respected constitutional scholars, contend that the legislative veto violates various provisions of the Constitution and the principle of separation of powers. Presidents don't like it; when he signed the Federal Election Campaign Act Amendments in 1976, President Ford instructed his Justice Department to test the constitutionality of a provision in those amendments that gives Congress the chance to veto administrative regulations of the Federal Elections Commission. I don't know what's happened to the challenge since President Carter has taken over. He had to accept a legislative veto provision, as have all presidents since the early 1930s, to get passage of the Reorganization Act of 1977, which restores to the president the power to propose and to effect, if Congress doesn't object, certain reorganizations of the executive branch.

If the legislative veto is so invalid, one might ask, why haven't the courts declared it so? The truth is that the validity of the device is one of those questions the Supreme Court has ducked. It did so last year when it held large chunks of the Federal Election Campaign Act unconstitutional in *Buckley* v. *Valeo*, 424 U.S. 1, although Justice White, speaking in a concurrence, stated that the legislative veto in that act was valid. The Court avoided the issue again this year when in *Clark* v. *Kimmitt*, 97 S. Ct. 2667, it found Ramsey Clark's challenge of the election act not ripe for adjudication. The closest the legislative veto has come to biting the dust is the three-judge dissent registered last May in *Atkins* v. *United States*, 556 F.2d 1028, by a minority of an en banc United States Court of Claims.

• ABOUT THE AUTHOR: Arthur John Keeffe observes the Washington scene from Foggy Bottom after a career of law teaching at Cornell and Catholic University of America.

Don't Predict the Court

Of course, one should never predict what the Supreme Court will do if and when it comes to rule on the reorganization type of veto, but there is a better than even chance that the Court will uphold it. But the more one studies legislative vetoes, the more convinced one is that there is a vast difference among these vetoes. One may be constitutional; another may not.

Take the one-house veto in the so-called Federal Salary Act of 1967 (2 U.S.C. § 352 et seq.). If the quadrennial Commission on Executive, Legislative, and Judicial Salaries is constitutionally organized, there should be no trouble in upholding the one-house veto provision (2 U.S.C. § 359(1) (B)) in the act. Just as the Reorganization Act does, the Salary Act contemplates that the salary commission, the president, and Congress will work together in fixing the salaries of members of Congress, the federal judiciary, and executive department employees.

But look at the way this commission is created. It comes to life every four years and consists of nine members from private life appointed as follows: three by the president, two by the president of the Senate, two by the Speaker of the House of Representatives, and two by the chief justice. How's that for giving legislative power to all three branches of government?

The commission makes its salary recommendations to the president, who then transmits them to Congress, changing them as he may wish. The president's recommendations automatically go into effect at the end of thirty days unless "there has been enacted into law a statute which establishes rates of pay other than those proposed by all or part of such recommendations," or—and here comes the neat legislative veto—"neither house of Congress has enacted legislation which specifically disapproves all or part of such recommendations."

There have been three different lawsuits in 1976 and 1977 with respect to the Salary Act.

Invalidate Salary Increases

Representative Larry Pressler, a Republican from South Dakota, brought an action to invalidate the salary increases that members of Congress received early in 1977 without there being a record vote on the president's recommendations. His argument was that this violates the constitutional provisions under which legislative power is vested in Congress (Article I, Section 1) and under which Congress is to receive "a compensation . . . to be ascertained by law" (Article I, Section 6). A three-judge federal court in the District of Columbia, consisting of Circuit Judge Tamm and District Judges Gesell and Flannery, dismissed the action on February 12, 1977, and Representative Pressler appealed to the Supreme Court.

Meanwhile, on April 12 the president signed Public Law 95-19, which amends 2 U.S.C. § 359 to require a separate, recorded vote by each house of Congress with respect to the salaries of the various classes of officers and positions within sixty days of receiving the president's recommendations. This caused the Supreme Court on May 16 to remand the case to the district court "in the light of the new legislation." On remand, the

statutory court held another hearing and again dismissed Representative Pressler's complaint. Since by this amendment Representative Pressler is assured in the future of a record vote, he can safely forget his lawsuit.

A second action in the United States District Court for the Eastern District of Virginia was brought by William C. McCorkle, Jr., seeking to obtain cost-of-living increases for supergrade government employees whose salaries ended up less than those of members of Congress. He argued that the congressional veto provisions in the Salary Act are unconstitutional and severable so that the supergrade employees are entitled to the increases in pay the president recommended and Congress refused.

Judge Bryan dismissed, saying: "I think as the single house veto has been provided for here, it is constitutional. But even if it isn't, I don't believe that this court can, or ought to, undertake to grant the type of relief that is here sought, which injects in my view, the judiciary in a conditionally and constitutionally reserved area . . . for Congress. . . . I don't believe this is a judicial function. . . . It is, in effect, a fixing of salaries. . . . "

The supergrades appealed, and a panel of the Fourth Circuit affirmed.

140 Federal Judges Sue

A third piece of litigation consists of three suits in the United States Court of Claims brought by 140 federal judges, whose chief counsel is former Supreme Court Justice Arthur J. Goldberg. Count I claims that the denial by Congress of the pay raises recommended by President Nixon in 1974 diminishes the judges' pay in violation of Article III of the Constitution. Count II attacks the one-house veto. The Senate, acting alone by Senate Resolution 293 on March 16, 1974, disapproved the president's recommendations. The judges contend that this legislative veto provision is unconstitutional and but for the Senate's unconstitutional exercise of power the pay raise would have gone into effect.

Neither Representative Pressler, the supergrade employees, nor the judges question the constitutionality of the manner of appointment of the salary commission, but the teaching of *Buckley* v. *Valeo* is that if the commission members are "officers of the United States," then the second paragraph of Section 2 of Article II of the Constitution requires that the president appoint them. And there is no authority permitting the chief justice to take any other job than presiding over the Supreme Court (Article III) or the Senate when a president is tried on a bill of impeachment (Article I, Section 3).

As a former assistant attorney general in charge of the Office of Legal Counsel, Robert G. Dixon, Jr., pointed out in a speech to the Association of American Law Schools, the supergrades and the judges hope to sustain the Salary Act and the machinery in it and to "reach the golden egg by voiding the accompanying one-house veto provision," although the goose is in rather poor health, afflicted as she is with the same disease that proved fatal to the first Federal Election Commission in *Buckley* v. *Valeo*. None of the litigants except Larry Pressler want to lose their good pay raises.

When the judges' case was argued in the Court of Claims, Rex E. Lee, dean of the J. Reuben Clark Law School at Brigham Young University, was on leave and acting as assistant attorney general in charge of the Civil Division. He conceded the unconstitutionality of the legislative veto provision in the Salary Act. The court then invited the Senate and House to file briefs as *amici curiae*. Cornelius B. Kennedy for the Senate and Eugene Gressman for the House submitted briefs arguing that the provisions are constitutional.

On May 18 the Court of Claims (556 F. 2d 1028) dismissed Count I of the judges' suit by a vote of six to one, but it managed to dismiss Count II by a narrow four-to-three vote. The well-written and reasoned majority opinion is per *curiam* and first points out that since the Department of Justice is "an arm of the executive" the department's concession of unconstitutionality of the one-house veto provision is not binding on the court.

The court also points out that under the veto statute the recommendations of the president go into effect unless neither house by "legislation" specifically disapproves "all or part." It interprets "legislation" to mean a one-house resolution of disapproval. Because the Senate resolution of March 16, 1974, disapproved the president's salary recommendations "in toto," the court confines its decision to that kind of resolution, thereby avoiding any discussion of a veto that disapproves only in "part."

Along the same line the court confines its opinion to the legislative veto as it appears in the Salary Act and does not consider an across-the-board veto as in the Election Act.

The court goes on to say that the Salary Act represents "legislative" power—the power of the purse. It defends the concern of Congress about the relationship of its own pay to the pay of judges and government employees, and it argues that were Congress not to keep control of salaries, the legislation might be held to permit an unconstitutional withdrawal of money from the Treasury without "appropriations made by law" (Article I, Section 9).

The three dissenters marshaled the arguments that numerous people, including presidents, have made and protested that the Salary Act's one-house veto is unconstitutional because it violates Article I, Section 1, vesting legislative power in Congress, not in one house; Article I, Section 7, clause 3, which reserves to the president the power to veto "every order, resolution, or vote to which the concurrence of the Senate or House of Representatives may be necessary"; Article II, Section 1, which vests executive power in the president; and the doctrine of the separation of powers.

One can see that under the structure established by the Reorganization Act and the Salary Act both the president and Congress play significant roles.

There is a day-and-night difference between the legislative vetoes in these acts and the one found in the Federal Election Campaign Act. The president doesn't have a role under the last act, which tells the Federal Election Commission not to put a single rule into effect without reporting it to Congress and allowing thirty legislative days to pass. If either house passes a resolution of disapproval during that period, the affected rule or rules will not go into effect. In effect, the F.E.C. is told to come to Congress and bow three times before it promulgates a single rule.

Legislative Veto Stands

After the Supreme Court's decision in *Buckley* v. *Valeo*, Congress amended the act to permit the president to appoint members of the F.E.C. but allowed the legislative veto to stand. To test the constitutionality of this, in July of 1976 Ramsey Clark, who was a candidate for nomination for United States senator from New York, instituted a suit in the federal district court in the District of Columbia for a declaratory judgment. The attorney general was allowed to intervene as a party plaintiff to support Mr. Clark's contentions, and Messrs. Kennedy and Gressman represented the houses of Congress.

The case was argued simultaneously before the United States Court of Appeals for the District of Columbia Circuit and a three-judge district court. On September 3, 1976, the district court certified five questions to the court of appeals.

But on September 14 Mr. Clark was defeated in the Democratic primary by Pat Moynihan. He was no longer a candidate. Then there was the matter of rules for the F.E.C. The commission, as reconstituted after *Buckley*, published proposed regulations for comment on May 26, 1976, and transmitted them to Congress on August 3. But the lawmakers adjourned for the election campaigns on October 1 before the regulations had lain before Congress for thirty legislative days.

When the District of Columbia Circuit decided the case on January 21, 1977, the majority of the en banc court held that the questions presented by Mr. Clark's suit were not "ripe," and for that reason the court did not reach the merits of the one-house veto provision. The per curiam majority opinion was joined by five of the court's judges—Bazelon, Wright, McGowan, Tamm, and Leventhal, Judge Wilkey concurred in the result, and Judges MacKinnon and Robinson dissented. The court also found the government's intervention claim not ripe because neither house had exercised power to disapprove regulations of the new commission.

The F.E.C. resubmitted its proposed regulations to Congress on January 11, 1977, and neither house disapproved them within thirty legislative days. The commission prescribed them as final regulations on April 13, 1977.

"As to plantiff Clark," the per curiam majority opinion said, "we are hard put to find any ripe injury or present 'personal stake' in whether or how the rules, regulations, and advisory opinions of the commission are reviewed by the legislature. Any ripe nexus arising out of Clark's position as a senatorial candidate vanished when he failed of nomination. As a voter, Clark protested no specific veto action taken by the Congress and identified no proposed regulation tainted by the threat of veto on review."

Election Act Standing

On the question of standing, the Election Act itself provides that "any individual eligible to vote in any election for the office of president of the United States may institute such actions in the appropriate district court of the United States, including actions for declaratory judgment, as may be appropriate to construe the constitutionality of any provision of this act." The act also directs district courts to certify immediately "all questions of constitutionality of this act to the United States Court of Appeals for the circuit involved, which shall hear the matter sitting en banc." The district court had certified five questions, none of which the court of appeals answered.

In *Buckley* v. *Valeo* the Supreme Court left open the question whether the form of legislative veto in the Federal Election Campaign Act is constitutional. But Justice White muddied the waters somewhat by stating in a concurring opinion that for an F.E.C. regulation "to become effective neither house need approve it, pass it, or take any action at all with respect to it. The regulation becomes effective by nonaction. This no more invades the president's power than does a regulation not required to be laid before Congress. . . . I would not view the power of either house to disapprove as equivalent to legislation or to an order, resolution, or vote requiring the concurrence of both houses."

When he came to write his strong dissenting opinion in the District of Columbia Circuit in the Clark case, Judge MacKinnon was as perplexed by Justice White's statement as the rest of us. The way Judge MacKinnon sees it, this statement ignores the "actual situation created in Congress" by the legislative veto provision of the Federal Election Campaign Act, and he went on to elaborate what is the actual situation:

(1) In congressional practice, for an F.E.C. regulation to become effective "*both* houses must approve it by voting *not* to veto it."

(2) That is the legislative equivalent for that house of "passing" legislation.

(3) To state that a proposed regulation may become effective without either house taking "any action at all with respect to it," to use Justice White's words, is to assume that Congress will act irresponsibly and fail even to consider regulations embodying "rules of law" that Congress has required by statute to be submitted to it subject to "appropriate action."

Judge MacKinnon also pointed out that under the one-house veto provision either a bare majority of a quorum in the Senate (26) or in the House (110) has the power to defeat proposed F.E.C. regulations, thus "depriving the president, possibly one house of Congress, and one third plus one of the members of each house from exercising legislative power supposedly vested in them by the Constitution."

Clark Appeals

Ramsey Clark appealed the decision to the Supreme Court. The election act provides for an appeal within twenty days from "any decision on a matter certified." The problem was that the court of appeals had not answered any of the questions certified by the district court, and Mr. Clark did not appeal the district court's order of dismissal.

To make matters worse, the Department of Justice, which had entered the Clark case and which in the judges' case had conceded the unconstitutionality of the legislative veto provision in the Salary Act, chose not to appeal. Of course, administrations had changed, and the new attorney general now sent his new solicitor general, Wade H. McCree, Jr., to tell the Supreme Court that the questions presented were not "ripe" for decision—a position that delighted Messrs. Kennedy and Gressman.

The solicitor general argued that the Court should not take the case even if it were technically appealable under the act. For this he cited Justice Brandeis's

opinion in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288 (1936), and its rules for ducking issues. In fact, Brandeis even contended that the "fact that it would be convenient for the parties and the public" to have a prompt decision on the constitutionality of a particular piece of legislation should "deepen the reluctance of courts to entertain" constitutional challenges. We know, of course, that Chief Justice Hughes had five votes to compel the Court to hear and decide whether the T.V.A. could buy out the Alabama Power Company, and in the bright light of hindsight we can see how wise it was for the Court to decide then and there that the T.V.A. was valid rather than ducking the issue because the plaintiffs held only a small amount of preferred stock.

With a touch of disdain, Mr. McCree, who used to be a judge on the Sixth Circuit, wrote in his memorandum that Mr. Clark "is not now, and may never be again, a candidate for federal office. If he does become a candidate at some future time, and can show then that the power of legislative veto operates to his disadvantage, he may then litigate the issue; but during the interim he suffers no injury or hardship from the absence of a final determination of the constitutionality of that power."

Court Dismisses Appeal

The Supreme Court bought the "ripeness" argument, and on June 6 it affirmed the court of appeals' dismissal (97 S.Ct. 2667). Three of the justices (Blackmun, Rehnquist, and Stevens) would have dismissed the appeal for want of jurisdiction and, treating the papers as an application for certiorari, would have denied that. It may be that Ramsey Clark technically didn't have an appeal under the election act, but it is clear that the Supreme Court could have taken the case by way of certiorari.

Just as Hughes saw the importance of taking and deciding the T.V.A. case in the 1930s, so the Supreme Court should have taken and decided the Clark case. The Court suffers as an institution from rejecting cases on narrow, technical, and "ripeness" grounds. Brandeis was dead wrong.

Meanwhile, the many legislative veto provisions are alive and well. The veto in the Salary Act has received the blessing of four Court of Claims judges, at least for the way the Senate used it in 1974 to veto all of the president's pay recommendations. But three judges in that court didn't agree. If you're counting, add Judge MacKinnon to those three dissenters. While his opinion in the Clark case in the District of Columbia Circuit is labeled a dissent, it actually is not that on the legislative veto point, as he was the only member of the court to reach the merits.

When, if ever, will the Supreme Court resolve the issues raised by the legislative veto? If you keep in mind that the Salary Act permits a one-house veto of "all or part" of the pay recommendations that the president transmits to Congress, then you might imagine this scene. The president sends recommendations to Congress for increases across the board for members of Congress, executive employees, and the federal judiciary. The Senate by a 26-0 vote adopts a Senate resolution disapproving only the increases for the chief justice or the associate justices. The House fails to take action. All the pay increases except those of the justices go into effect.

This would be a tough case, and one I hope will never occur. But sometime I'd like to see the Supreme Court take on the legislative veto. ▲

(This is the second of two articles on the legislative veto. The first appeared in the September issue, page 1296.)

(Continued from page 1343)

should be the development of delivery systems that do not require general subsidies from the taxpayers.

A private system for the delivery of legal services would ensure that the essential professional attributes of confidentiality, independent professional judgment, and loyalty to the client are maintained. The bar should not underestimate, or permit the public to underestimate, the professional skill and judgment required to render the lawyer's classic professional services. There is no substitute for trained legal professionalism in complex transactions or litigation.

Emphasis on a private market solution does not mean that the bar must have a single, simplified approach. The delivery of legal services is complex, so any approach must be flexible and varied and contain some elements of the following: changing substantive law to eliminate legal problems, encouraging new forms of advocacy for more effective protection of legal rights, attempting to increase and improve group legal services programs, and many more. Rigid customs and procedures must give way to viable new ideas. Sidney Smith, the nineteenth century English divine, once said: "When I hear any man talk of an unalterable law, the only effect it produces on me is to convince me that he is an unalterable fool."

The organized bar must also clarify exactly what role it will play in improving the delivery of legal services. Bar associations do not practice law; they do not deliver legal services. The organized bar has only two functions in improving the delivery of legal services to ordinary citizens. First, it must perform an educational role in teaching lawyers how to provide better legal services in better ways and in educating ordinary citizens about how and when to seek legal help. Second, the bar traditionally has attempted to ensure that quality legal services are available to the public, and that role will continue to be a part of the organized bar's approach to the delivery of legal services.

The American Bar Association is acting to discharge its responsibility as a leader of the organized bar. The Association is hard at work at attempting to co-ordinate all the many facets of the delivery of legal services and to prepare a general outline of how the organized bar and the profession can approach the problem in the coming years. The Consortium on Legal Services and the Public, a kind of supercommittee that brings together the chairmen of most standing and special committees concerned with delivery issues, has prepared a critical review discussing delivery problems for middle- and low-income people, strategies for meeting the needs, analyzing where the bar stands, and making some recommendations as to where we should go from here. The consortium will hold a national conference on December 16 and 17, 1977, in New Orleans. It is my pleasure to join with the consortium in acting as host for this conference.

During the conference the work of the consortium will be discussed and final agenda for bar action will be prepared. The conference is open to anyone who would care to participate. If you are interested in attending or obtaining any materials about the delivery of legal services, please write to Susan O'Neill at the American Bar Center expressing your interest. If you cannot attend, I hope that you will read about the discussions and conclusions reached in New Orleans and about other proposals relating to delivery of legal services.

The time has arrived for the organized bar to solidify its efforts in this field. Whatever is forthcoming from New Orleans will be most important because it will help shape the practice of law in the future. ▲

International Law Notes

Congress and the Law of the Sea Conference

By Paul N. McCloskey, Jr., and Ron Losch

THE SIXTH SESSION of the Third United Nations Conference on the Law of the Sea ended July 15, 1977, with many conference participants hopeful that a major step had been taken toward a successful law of the sea treaty. This hope was based on the progress made in open negotiations on the highly contentious deep sea bed issues.

But the release on July 20, 1977, of the Informal Composite Negotiating Text dashed these hopes. The head of the United States delegation, Elliot Richardson, pointing to a lack of "fair and open processes" in the compilation of the I.C.N.T., recommended that the United States undertake a "most serious and searching review of both the substance and procedure of the conference."

Ambassador Richardson's comments were prompted by what he characterized as an "unfortunate, last minute deviation from what had seemed to be an emerging direction of promise in the deep sea bed negotiations." This "deviation" was a major, eleventh-hour revision of a series of compromise articles that had been drafted by Jens Evensen of Norway. Most delegations had expected that the "Evensen articles," which reflected compromises reached after arduous negotiations in Geneva in March and in New York during the past session, would be reproduced in the I.C.N.T. when that text was assembled by the president of the conference, H. Shirley Amerasinghe of Sri Lanka, after receiving suggestions from the chairmen of the conference's three operating committees.

● Paul N. McCloskey, Jr., is a member of the House of Representatives from the Twelfth District of California and sits on the House Committee on Merchant Marine and Fisheries. A graduate of Stanford University (A.B. 1950, LL.B. 1953), he has been a congressional observer at the U.N. Law of the Sea Conference.

Ron Losch is the minority counsel of the House Merchant Marine Subcommittee. A graduate of the Coast Guard Academy (B.S. 1968) and George Washington University (J.D. 1975), he has assisted Representative McCloskey on maritime and oceans issues.

The Evensen articles, prior to their last minute revision, had pointed to formulas that could have broken the deadlock between the Group of 77 (a caucus representing more than 110 developing countries) and the industrialized countries over the terms and conditions that should attach to the exploitation of the resources of the deep sea bed, the "common heritage of mankind." This deadlock had become apparent during the previous session in September, 1976, after a closed, or restricted, negotiating process had made compromise and accommodation in an atmosphere of mutual trust impossible. Evensen managed to create a productive, open atmosphere by proposing a series of articles on the unresolved issues and then allowing closely focused and limited debate open to all parties. Using this slow and painstaking process both prior to and during this past session, Evensen was able to close the differences.

Evensen-Produced Articles

The Evensen-produced articles included provisions for (1) access to the sea bed by states and private parties for the purpose of exploitation; (2) general policies and principles regarding control of exploitation; (3) financial arrangements, including initial financing for the "Enterprise" (an internationally controlled deep sea bed mining company), as well as revenue sharing and transfer of technology to the international community via the International Seabed Authority; (4) institutional ar- oriented executive body, the "Council," tionships between the one-nation, one-vote "Assembly" and the interest-oriented executive body, the "Council," as well as a mechanism to settle disputes arising from deep sea bed exploitation, the "Tribunal"; and (5) a mechanism to review the workings of the entire system after it had been in operation to ensure that it was achieving its basic goals.

Although Ambassador Richardson had stated that "substantial" differences remained between our position and the Evensen articles, it was clear that the Carter administration was prepared to accept much of Evensen's work, with some modification, in exchange for the conclusion of a comprehensive treaty that satisfied the majority of our interests on all law of the sea issues. It was generally accepted within the United States delegation that, if the Evensen articles were passed on by the Committee I chairman (Paul Bamela Engo of the United Republic of Cameroon) to Conference President Amerasinghe for inclusion in the I.C.N.T., substantial progress would have been achieved. It was believed that the result would be generally acceptable to the administration and make possible ratification by the Senate if some minor changes were made.

So Ambassador Richardson and many delegations were shocked and frustrated when they discovered, after the adjournment of the conference, that the Evensen articles had been replaced surreptitiously by articles that did not reflect the compromises negotiated in the open sessions. Neither did they reflect, as the ambassador pointed out when he testified before the House Merchant Marine and Fisheries Committee, the "preponderant views of the Group of 77" or those of the United States.

Restricted and behind-the-scenes negotiations that result in last minute substitutions of unfamiliar provisions clearly favoring one interest group or another have often plagued the conference. In this 1977 session these negotiations resulted in articles contrary to our interests, but only fifteen months before, during the fourth session (March–May, 1976), behind-the-scenes negotiations wrought the revised single negotiating text that favored the United States' position. The reaction to the R.S.N.T. by the Group of 77 after they realized that se-

cret negotiations had been conducted was similar to Ambassador Richardson's reactions to the I.C.N.T. Just as he blasted the last minute switch in a public statement after the release of the I.C.N.T., the Group of 77 had made their position and annoyance with the procedures surrounding the production of the R.S.N.T. clear following the fourth session. During the fifth session (August–September, 1976), they rejected the bulk of the R.S.N.T. while clinging to the concessions made by the United States.

Shortcomings Recognized

The shortcomings of secret or closed negotiations, interestingly enough, were recognized by Mr. Engo in a speech to a number of members of Congress a few days before he changed the Evensen articles, when he said that "restricted negotiations, however efficient and productive, are unreliable as devices for achieving progress, since any compromises reached are treated with suspicion and often rejected by those who did not, or could not, participate."

Apparently failing to heed his own advice, Mr. Engo, either acting alone or in concert with a limited number of others, materially changed the Evensen articles when drafting his section of the I.C.N.T. for submission to the conference president for compilation.

The questions now are whether a reasonable balance can be restored and whether the next session of the conference, scheduled for March of 1978 in Geneva, holds any hope of further progress. Ambassador Richardson couldn't have expressed the problem more succinctly when he stated it is time to review "whether or not an agreement acceptable to all governments can be best achieved through the kind of negotiations which thus far have taken place."

The disappointment of the most recent session was sharply focused in the immediate markup and passage of a strong and anti-internationalist deep sea bed mining bill by the House Merchant Marine and Fisheries Committee on July 28.

United States foreign policy is usually determined by the executive branch, not Congress. In the case of the Law of the Sea Conference, however, Congress has before it a piece of domestic legislation that could have a significant impact on, if not destroy, the success of negotiations in which the United States has been the acknowledged leader since 1970. Congress has a particularly important responsibility to understand the problems at the conference and the chances of their resolution, as well as the international relations impact of unilateral action on the conference, on international law, and on the future chance to preserve world peace on and under oceans that cover two thirds of the surface of the earth.

The legislation has its genesis in deep sea bed mining technology largely created by the United States. During the past few years several American corporations and their foreign partners have asked Congress for legislation to give financial, diplomatic, and military protection to their proposed deep sea bed mining ventures. Although these multinational corporations have stated that they would prefer to see these activities conducted under an acceptable, comprehensive international law of the sea treaty, seven years of fruitless negotiations have frustrated the continued development of their technology. There has been an understandable reluctance of investors to risk their capital without either a treaty or legislative support.

Technological Lead Compromised

The companies maintain that further delay will prejudice the United States' technological lead. They argue that any restriction on the development of new technology, a valuable commodity, is contrary to our national interest, since we are or will be increasingly dependent on potentially hostile foreign nations for our supply of the minerals found in abundance in the deep sea bed nodules—notably nickel, copper, cobalt, and manganese.

Congress now faces important questions that have broad international ramifications. Should it support unilateral legislation that will protect the rights, property, and investments of United States citizens and foreign nationals in partnership with them who choose to exercise the freedom of the seas by mining the resources of the deep sea bed? Should it allow the negotiations to continue, perhaps slowing the development of new technology and resources, without the complicating factor of unilateral claims to jurisdiction over deep sea bed resources that may result after the passage of unilateral legislation? Or should it attempt to enact unilateral legislation that will encourage the successful conclusion of the conference, recognize the basic principles underlying the conference, allow the development of the technology necessary to develop the resources of

the sea bed, and ensure that deep sea bed resources are brought to the world market?

While few people disagree that unilateral deep sea bed mining legislation will have an effect on the conference, there is widespread disagreement over the precise nature of this effect. Any action by Congress should be undertaken only after thoughtful consideration of all the facts.

Unilateral action by the United States regarding the exploitation of deep sea bed resources will set a significant precedent in international law. Other countries are looking to our lead in the formulation of their alternatives. For example, on June 22 the legislature of the Federal Republic of Germany passed a resolution stating that:

"If the difficulties that have arisen in respect of the elaboration of a sea bed regime should prove impossible to overcome, the German Bundestag will examine without undue delay whether, on the basis of reciprocity, there must be found alternative or interim settlements as have already been considered by some states. The further continuous development of sea bed mining technology by German enterprises and the investments already made therein must be safeguarded."

It is very likely that should the United States pursue unilateral action, the Federal Republic of Germany and other countries will quickly follow suit. In light of this possibility, Congress should be careful not to pass legislation that could be used against the United States to limit its rights on the high seas. If the United States asserts jurisdiction over deep sea bed resources or attempts to regulate the activities of its nationals in an area of the high seas, it loses the ability to argue that it would be illegal for other countries to take similar actions.

If legislation, for example, authorizes or licenses our nationals to conduct activities in a specific area of the ocean, it is likely that it would touch off a series of claims by other countries over vast areas of the deep sea bed, regardless of whether those nations now possess the technology to mine the deep sea bed. This could lead to chaos in the oceans through conflicting claims or assertions of rights.

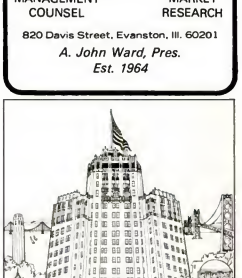
Even if it does not lead to actual conflict, unilateral action could damage our international relations, prompting possible retaliation in other areas (for example, oil embargoes, coffee restrictions, or expropriations). A number of the diplomats of the Group of 77 countries have privately stated this, and there seems little doubt that these countries' emotional attitudes fully justify a prediction that they will take strong action against the United States if given the slightest provocation or justification.

Another product of unilateral legislation could be further disruption or even termination of the negotiations themselves. The conference deals with a host of issues of great importance to the United States ranging far beyond that of deep sea bed mining. The conference has come to agreement on many of these issues, some of which have been the subject of dispute for thirty years or more. Codification of these emerging international agreements could create a stable system of law for the oceans of great value to the United States since it is involved in virtually every conceivable ocean use.

Agreement on Navigational Rights

Agreement has been reached on the territorial sea and navigational rights within it. The concept of "innocent passage" has been tightened. The provisions of the R.S.N.T. regarding pollution control and safety of navigation have been revised to bring them closer to the practice of the United States under the Ports and Waterways Safety Act. The I.C.N.T. has been improved to the point where a treaty based on it would satisfy the United States' national defense requirements of unimpeded transit through and over straits as well as preserving important high seas freedoms associated with navigation and communication in the economic zone. Important changes have been made to prevent the territorialization of the economic zone. Commercial navigation has been protected through provisions for the application of uniform international standards regarding navigational safety and marine pollution beyond the territorial sea.

The I.C.N.T. marks progress on the difficult, but crucial, issue of scientific research, clearly stating the conditions under which research will take place. It provides that states "shall, in normal circumstances, grant their consent" to conduct scientific research in the economic zone when the research is not of "direct" significance to resource exploration and exploitation. Should a state not respond within four months of a request to conduct scientific research, consent is "implied." While this gain is modest in the light of international trends regarding the regulation of scientific research, Ambassador Richardson



has stated correctly that the I.C.N.T. is extremely helpful in "regularizing what until now has been a capricious situation."

Progress also has been made toward establishing boundary delimitation of the continental margin and between zones of adjacent and opposite states. And finally progress has been made in the creation of an acceptable system for peaceful settlement of disputes related to ocean uses. This is of extreme importance if future conflicts are to be resolved through peaceful means rather than through confrontation and hostile action. The attempt to achieve a comprehensive international law of the sea treaty therefore remains of great potential value to the United States and deserves continued support despite the frustration and dismay caused by apparently only a single individual, Mr. Engo.

Three courses of action should be pursued. First, Ambassador Richardson and his staff should be commended for the patience and skill they have exhibited in stimulating open and fair negotiations that restored mutual faith and trust to the conference participants to a degree that seemed impossible to achieve at the conclusion of the fifth session in September, 1976.

Second, Ambassador Richardson and the State Department should seriously examine the procedures under which the I.C.N.T. was negotiated and recommend to the conference leadership methods most appropriate for reaching a final comprehensive agreement. This recommendation is of critical importance because, in spite of the good faith efforts on the part of the United States, the negotiations have become heavily politicized. Manipulation by parties without substantive interests must be ended if there is to be genuine progress toward a treaty.

Finally, Congress should take care in its consideration of legislation to allow American-based multinationals to continue to develop the technology necessary to mine the deep sea bed. Any legislation considered to be necessary must be drafted to reflect the United States' clear and continued commitment to successful treaty negotiations and confirmation of the principle that the deep sea bed resources are the common heritage of mankind.

There is no reason for the Congress to abandon the principles embodied in House Resolution 330 and Senate Resolution 82 of the Ninety-third Congress, which declared these objectives for the Law of the Sea Conference:

"(1) Protection of (a) freedom of the seas, beyond a twelve-mile territorial sea, for navigation, commerce, transportation, communication, and scientific research, and (b) free transit through and over international straits.

"(2) Recognition of the following international community interests: (a) protection from ocean pollution; (b) assurance of the integrity of investments; (c) substantial sharing of revenues derived from exploitation of the seabed, particularly for economic assistance to developing countries; (d) compulsory settlement of disputes; and (e) protection of other reasonable uses of the oceans beyond the territorial sea, including any economic intermediate zone.

"(3) An effective International Seabed Authority to regulate orderly and just development of the mineral resources of the deep sea bed as the common heritage of mankind, protecting the interests both of developing and of developed countries.

"(4) Conservation and protection of

living resources, with fisheries regulated for maximum sustainable yield, with coastal state management of coastal species and host state management of anadromous species, and international management of such migratory species as tuna."

Congress also should consider the established doctrine of freedom of the seas, as expressed in the 1958 Convention on the High Seas, in the formulation of any deep sea bed mining legislation.

Congress has a significant responsibility with regard to the question of the timing and content of deep seabed mining legislation. To discharge this responsibility successfully, it should press the Carter administration for a careful consideration and development of a comprehensive oceans policy.

Congress should understand (1) the administration's foreign policy program, recognizing that sea bed mining legislation is a major foreign policy initiative and cannot and should not be attempted by Congress alone; (2) the problems the administration now faces in negotiating a comprehensive law of the sea treaty; (3) the probabilities of successfully concluding the law of the sea negotiations; (4) all of the substantial ocean interests of the United States which could be protected by a treaty, a number of which have not been fully expressed to congressional committees of jurisdiction; (5) the true needs of the United States and world consumers for the resources to be developed from the sea bed; and (6) the problems faced by the United States-based consortiums that intend to exploit the resources of the seabed and are seeking financial and military protection from the United States through legislation or from the international community through a treaty.

Deep sea bed mining legislation will be a history-making precedent. It will represent, for the first time, an exercise by the United States government of statutory jurisdiction over activities conducted in specific areas of international waters beyond its continental shelf and 200-mile limit. Congress owes the people of the United States a far more thoughtful consideration of these issues than the cursory and rushed proceedings of a single House committee that on July 28 acted without giving the administration the chance to consider and reflect on the serious consequences arising from the closing of the sixth session of the Law of the Sea Conference and the appearance of the infamous informal composite negotiating text. ▲

Toxicology Workshop to Be Held in Chicago

A TOXICOLOGY workshop on clinical and forensic toxicology pharmacometrics will be sponsored by the University of Illinois Abraham Lincoln School of Medicine, Chicago. The workshop will be held at the University of Illinois at the Medical Center in Chicago on December 8–9.

The workshop is designed for both technical and nontechnical personnel whose professions require competence in the areas of clinical and forensic toxicology and pharmacometrics—clinical chemists, forensic pathologists, law enforcement and drug abuse personnel, lawyers, medical technologists, pharmacologists, public health and environmental quality regulatory staff, and toxicologists. The fee is $90 for two days; $45 for one day. The registration deadline is November 24.

Further information may be obtained from the University of Illinois at the Medical Center, Office of Continuing Education Services, 1853 West Polk Street, Room 144, Chicago, Illinois 60612 (telephone 312/996-8025). ▲

Map of Legal London Available

A REPRODUCTION, suitable for framing, of the map of Legal London that appeared in the center spread of the May, 1971, *American Bar Association Journal* (pages 454–455), is available. The reproduction, on a linen-finish vellum paper, is of G. Spencer Hoffman's birds-eye pictorial representation drawn in 1930–1931. Measurements of the reproduction are 17" wide by 11", but the width is trimmable to 13¾" for framing purposes.

The map is available at $1.50 postpaid from the American Bar Association, Circulation Department, 1155 East Sixtieth Street, Chicago, Illinois 60637.

Tax Notes

Prepared under the direction of Ingrid L. Beall, Tax Notes Editor, and George A. Luscombe II, Associate Tax Notes Editor of *The Tax Lawyer*, Bulletin of the Section of Taxation.

Disclosure of Private Rulings under the Tax Reform Act of 1976

By Alan F. Segal, Chicago, Illinois

THE TAX Reform Act of 1976 made several significant changes involving the disclosure of letter rulings and technical advice memoranda to the public.

Generally, under newly added Section 6110 of the Internal Revenue Code, Internal Revenue Service written determinations (rulings, determination letters or technical advice memoranda, and all background file documents, such as requests for ruling, written materials submitted in support of the ruling request, and any communications between the I.R.S. and persons outside the I.R.S. in connection with the ruling) are to be made public after deletion of certain information. A written determination generally will not include documents such as a notice of deficiency, reports on claims for refund, or similar documents required to be issued by the I.R.S. in the course of tax administration. Also excepted are closing agreements entered into between the I.R.S. and a taxpayer that finally determine the taxpayer's tax liability with respect to a given year. These agreements are generally the result of a negotiated settlement and do not necessarily represent the service's view of the law.

A complete set of I.R.S. rulings, determination letters, and technical advice memoranda will be made available in the National Office Reading Room in Washington, D.C., together with a subject matter index. The index will classify written determinations on the basis of the code sections and the issues involved. The I.R.S. recently has proposed regulations governing the procedures for public inspection. Treasury Regulation § 301.6110, 42 Fed. Reg. 30868 (1977). As was anticipated by Congress, a number of commercial services now offer weekly reports of the rulings in complete or excerpted form.

Reasons for Change

There has long been a well-established procedure within the Office of the Assistant Commissioner (Technical) in the National Office of the I.R.S. enabling taxpayers to obtain written advice on the tax consequences or treatment of a specific transaction.[1] These rulings, however, have been treated as "private" in the sense that they are issued in response to the request of the taxpayer and are officially kept confidential. Although the private rulings procedure had significant advantages for both the I.R.S. and taxpayers, it was argued that the private ruling system developed into a body of law known only to a few members of the tax profession. In addition, it was felt that the "secrecy" surrounding letter rulings generated suspicion that the tax laws were not being applied in an even-handed manner. This led to litigation to open private rulings to public inspection and subsequently to Section 6110.

What Is Exempt?

As part of the I.R.S. determination procedure, a taxpayer is required to submit detailed relevant factual information. In an effort to balance the public's desire to know what rulings are being issued against the taxpayer's right to keep private confidential or personal information, Congress provided in Section 6110(c) of the code that the secretary is required to delete from the written determination or background file the following information:

1. Names, addresses, and other identifying details of the person to whom the written determination pertains and of any other person (other than third party contacts) identified in the determination or background file document;

2. Information specifically authorized under criteria established by an executive order to be kept secret in the interest of national defense or foreign policy;

3. Information specifically exempted from disclosure by any statute;

4. Trade secrets and commercial or financial information obtained from a person and privileged or confidential;

5. Information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

6. Information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for use of an agency responsible for the regulation or supervision of financial institutions; and

7. Geological and geophysical information and data, including maps, concerning wells.

While Section 6110(c) provides that the deletions are to be made by the secretary, the I.R.S. requires the taxpayer to submit with the ruling request a statement of proposed deletions and either the statutory basis for each proposed deletion or a statement that no information other than names, addresses, and taxpayer identifying numbers need be deleted. As the proposed deletions must not appear or be referred to anywhere in the request for ruling or determination letter, the statement of deletions must be made in a separate document. It must also be accompanied by a copy of the request for ruling or determination letter and supporting documents, on which is indicated by the use of brackets the material the person making the request indicates should be deleted pursuant to Section 6110(c). Should the person making the request decide to request additional deletions prior to the time the ruling or determination letter is issued, additional statements may be submitted. Treasury Regulation § 601 .201(e)(5).

Any request for ruling or determination letter that does not comply with these provisions will be acknowledged and the requirements that have not been met will be pointed out. If a request for ruling lacks essential information, the

1. See Tax Notes, 58 A.B.A.J. 647 (1972), for an in-depth discussion of the procedures for submission of a request for ruling. Rev. Proc. 72-3, 1972-1 C.B. 698, still provides the general guidelines for these requests. See also Treas. Reg. § 601.201, as amended on June 30, 1977.

taxpayer or his representative will be advised that if the information is not forthcoming within thirty days, the request will be closed. If the information is received after the request is closed, the request will be reopened and treated as a new request as of the date of the receipt of the essential information. Treasury Regulation §601.201(e)(9).[2]

Practitioners should note also that the new regulations require that the request for ruling contain a declaration under penalties of perjury that the facts are true, correct, and complete. This declaration must be signed by the person or persons on whose behalf the request is made. Treasury Regulation § 601 .201(e)(1).

Third Party Contacts

In order to protect against impropriety and undue influence in the rulings process Section 6110(d) of the code establishes a flagging procedure with respect to written determinations requested after October 31, 1976. If a particular determination is the subject of a contact (written or otherwise) by anyone other than the taxpayer or his representative before the determination is issued, the I.R.S. will be required to note that fact at the time the determination is made public, by noting the date of the contact and by identifying the nature of the contact by category, that is, White House, congressional, Department of the Treasury, trade association, and the like.

The general explanation of the Joint Committee on Taxation notes that it is expected that the I.R.S. will make a written notation of all telephone contacts from outside parties with respect to a particular written determination. Contacts made by an employee of the service are not to be noted. For this purpose employees of the Office of Chief Counsel of the I.R.S. are to be considered I.R.S. employees. In addition, contacts made by the chief of staff of the joint committee are not to be noted.

Any person wishing to obtain further information regarding the identity of the contacting party and the nature of the contact may request access to the service's background files. On payment of the charges for search, deletion, and copying (subject to provisions for a reduction or waiver of these charges when the disclosure is in the public interest), the I.R.S. will be required to make available information in the background file pertaining to the contact made, including the name of the contacting party and the person to whom the contact was addressed. If a third party wishes to learn the identity of the applicant for the written determination, he may bring suit in either the Tax Court or the United States District Court for the District of Columbia. The identity of the applicant may not be disclosed unless the court finds both evidence in the record from which one could reasonably conclude that an impropriety occurred or that undue influence was exercised and finds that the disclosure would be in the public interest.

Disclosure of Determination

Section 6110(f) of the code provides that the secretary, on issuance of any written determination or on receipt of a request for a background file document, shall mail a notice of intention to disclose this determination or document to any person to whom the written determination pertains. After receiving the notice (including a copy of the version proposed to be open to public inspection and notations of third-party communications pursuant to Section 6110(d)), the person requesting the ruling or determination letter may protest the disclosure of information within twenty days after the notice is mailed by submitting a written statement identifying deletions he believes should have been made. He must also submit a copy of the version of the ruling or determination letter proposed to be open to public inspection that indicates, by use of brackets, the deletions proposed by the taxpayer but have not been made by the I.R.S. The I.R.S., within twenty days after receipt of the submission, must mail to such person its final administrative conclusion with respect to the deletions to be made. The I.R.S. generally will not consider the deletion of any material the taxpayer did not propose to be deleted prior to the issuance of the ruling or determination letter. Treasury Regulation §601.201(e)(16).

After receiving the notice of intention to disclose, pursuant to Section 6110(f), but no later than sixty days after the notice is mailed, the person requesting a ruling or determination letter may submit a request for delay of public inspection pursuant to either Section 6110(g)(3) or (4). The request for delay must be submitted to the office to which the request for ruling or determination letter was submitted and must contain the date on which it is expected that the underlying transaction will be completed. A request for delay pursuant to Section 6110(g)(4) must contain a statement from which the commissioner may determine that good cause exists to warrant the delay. Treasury Regulation §601.201(e)(17).

Disputes Relating to Disclosure

If an agreement as to the extent of public disclosure cannot be reached between the service and the person who receives the determination letter and he has exhausted his administrative remedies as set forth in Treasury Regulation §601.201(e), the person seeking to have the confidentiality maintained may file, within sixty days after the mailing of the notice of intention to disclose, a petition in the United States Tax Court for a determination as to whether the disputed portion should properly be open to public inspection. Section 6110(f)(3). Practitioners should note that this sixty-day filing deadline allows very little time between the final administrative conclusion under Treasury Regulation §601.201(e)(16) and the petition due date. Any person who requests additional disclosure of any written determination or background file document who first exhausts his administrative remedies may seek an order requiring additional disclosure by filing a petition in the Tax Court or a complaint in the United States District Court for the District of Columbia. The matter will be examined de novo in order to determine whether the document should be open to public inspection. The burden of proof is on the commissioner and any other person seeking to restrain disclosure. Section 6110(f)(4)(A).

The Tax Court recently issued new rules (Title XXII, Rules 220–30, effective August 1, 1977) governing these disclosure actions and those involving third-party contacts.[3] The new rules set forth the jurisdictional requirements, including exhaustion of administrative remedies under Section 6110(f)(2)(A) and (4)(A) for both additional disclosure actions, and actions to restrain disclosure. In addition, in an action to restrain disclosure, the commissioner must have issued a notice of intention to disclose or,

2. *Tax Management* recently reported that the Internal Revenue Service is advising applicants for letter rulings that applicants may not waive the right to have identifying material deleted. When an applicant for a ruling states that it does not wish to make these deletions or provide the I.R.S. with an itemization of the deletions, the I.R.S. will not process the application for the ruling. A different rule may exist with respect to technical advice requests. T.M.M. 77-12, June 6, 1977.

3. It is anticipated that the new rules, together with explanatory notes prepared by the Rules Committee will be printed in Volume 68 of Tax Court Reports. The notes are not officially part of the rules and will not be included in the printed publication that will be prepared for general distribution.

Tax Items of Interest

Stock for stock reorganization ruled "contemporaneous" with independent exchange. Revenue Ruling 77-271, I.R.B. 1977-32, page 10. X, the sole shareholder of a corporation, exchanged all of his stock in that corporation for stock of equal value in a widely held corporation. At the same time, X entered an employment contract with the acquirer in exchange for additional shares of the acquirer. The service has ruled that this arrangement constitutes two separate transactions. First, the stock-for-stock exchange is viewed as a tax-free reorganization under Section 368(a)(1)(B) in which stock in one corporation was exchanged *solely* for stock in the other. Second, the issuance of the additional stock to X is viewed as in exchange for employment and so results in ordinary income in the amount of the fair market value of the stock when issued. Thus, while the second exchange is not tax free, neither is it violative of the stock-for-stock requirement of Section 368(a)(1)(B).

(Do you have an item of interest to share with others? Items of unusual interest, including audit and private ruling positions, should be sent to Ingrid L. Beall, 2800 Prudential Plaza, Chicago, Illinois 60601.)

in the case of a prior written determination, the commissioner must have issued public notice in the *Federal Register* that the determination is to be opened to public inspection. As previously noted, Section 6110(f)(3)(A) provides that the petition must be filed with the court within sixty days after mailing by the commissioner of the notice of intention to disclose. In the case of a prior written determination, the petition must be filed with the court within seventy-five days after the date of publication of the notice in the *Federal Register*. In a third party contact action, the commissioner must have been required to make a notation on the written determination in accordance with Section 6110(d)(1), and the petition must be filed within thirty-six months after the first date on which the written determination was open to public inspection. Rule 220(c). The other new rules deal with matters such as commencement of the disclosure action, place of trial, other pleadings, intervention, joinder of parties, burden of proof, anonymity,[4] and confidentiality.[5]

Time for Disclosure

Under Section 6110(g) of the code a written determination or any background file document, as sanitized under Section 6110(c), must be made available for public inspection no earlier than seventy-five days and no later than ninety days after the I.R.S. gives notice of the impending disclosure. In the event of litigation under Section 6110(f), disclosure must be made within thirty days after the date on which the court decision becomes final.

In the case of a delayed disclosure under Section 6110(g)(3), disclosure may be delayed for an initial period of up to 90 days. This first extension is to be automatic on a showing that the transaction will not be completed until the period in question has passed. A second extension up to an additional 180 days may be granted when the transaction is not complete at the end of the initial period and the secretary determines that there is good cause for delay. The burden of showing good cause is on the person requesting the delay. Either extension will expire not later than 15 days after the date the secretary determines that the transaction is complete. Thus, if both extensions are allowed for the completion of a transaction, disclosure can be delayed up to 360 days.

If the secretary fails to make the deletions required by Section 6110(c) or fails to follow the procedures relating to the timing of disclosure under Section 6110(g), the recipient of the written determination or any person identified in the written determination is given as an exclusive civil remedy an action against the secretary in the Court of Claims. Section 6110(i). In any suit in which the court determines that an employee of the I.R.S. intentionally or willfully failed to delete or to follow the prescribed disclosure procedures, the United States will be liable for actual damages (in no case less than $1,000) and costs of the action, together with reasonable attorneys' fees as determined by the court.

Section 6110(j)(3), which purportedly codifies prior administrative rules, provides that unless the secretary establishes otherwise by regulations, a written determination may not be used or cited as precedent. An exception is provided for excise tax determinations under Subtitle D of the code. The joint committee explanation notes that Congress was concerned that if all publicly disclosed written determinations were to have precedential value, the I.R.S. would be required to subject the determinations to considerably greater review than is provided under current procedures. Congress felt that the resulting delays in the issuance of determinations would mean that many taxpayers could not obtain timely guidance from the I.R.S. Presumably determinations with precedential value would be published in the *Internal Revenue Bulletin*.

While the statute states that written determinations may not be used or cited as precedent, it is submitted that if as a result of the new disclosure program a taxpayer discovers a number of rulings involving factual situations similar to his, he will justifiably want to know why he cannot obtain a similar ruling.[6]

Consider the situation in which the I.R.S. has been routinely issuing a certain type of ruling. A taxpayer, aware of these rulings as a result of disclosure under Section 6110, goes forward with his transaction, which is identical to the routine ruling situation, but does not request a ruling. Two years later the I.R.S. changes its rulings position and on audit of the taxpayer for the prior period determines that a deficiency exists because of the given transaction. It is submitted that the taxpayer should not be subjected to "discriminatory" treatment because "a written determination may not be used or cited as precedent." Until the law is changed, taxpayers are advised to seek their own private rulings even in routine situations.

The disclosure provisions of the Tax Reform Act of 1976 relate to all rulings, technical advice memoranda, and determination letters, whether or not issued after July 4, 1967, the effective date of the Freedom of Information Act (5 U.S.C. § 552). Section 6110(h) provides certain rules to determine the order in which disclosure is to occur for pre-November 1, 1976, written determinations. Contingent on the availability of funds specifically appropriated to the service for the purpose of making prior

4. Under Rule 227 in an action to restrain disclosure, the petitioner may file the petition anonymously, if appropriate. Interveners may also proceed anonymously, if appropriate. In all cases, the party must set forth in a separate paper to be filed with the initial pleading his name and address and the reasons why he seeks to proceed anonymously.

5. Rule 228 provides that the petition and all other papers submitted to the court in any disclosure action will be placed and retained by the court in a confidential file and will not be open to inspection unless otherwise permitted by the court.

6. See, *e.g., Fruehauf Corporation v. Internal Revenue Service*, 522 F. 2d 284 (6th Cir. 1975), vacated and remanded for reconsiderstion in light of the Tax Reform Act of 1976, 429 U.S. 1085, following which the I.R.S. listed in the *Federal Register* the categories of documents it would make available to Fruehauf. 42 Fed. Reg. 10923 (1977). *International Business Machines Corporation v. United States*, 343 F. 2d 914 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 1028 (1966).

determinations open to public inspection, the I.R.S. is directed to release on a last-in, first-out basis in the following order: (1) all prior determinations issued under the 1954 code that have been used by the I.R.S. as guidelines for other determinations; (2) all prior nonguideline determinations, other than nonguideline determination letters, issued after July 4, 1967; and (3) all prior determinations issued under the internal revenue laws as in effect prior to the 1954 code that have been used by the I.R.S. as guidelines for other determinations.

The Treasury, Postal Service, and General Government Appropriation Bill of 1977 (Public Law 95-81) includes a $3.2 million appropriation for these purposes.

Determinations issued on or before July 4, 1967, will not be formally released by the I.R.S. although they will be available on request after they are made open for public inspection but only on payment of charges for search, deletion, and copying.

Tax Analysts and Advocates recently indicated that it is seeking additional disclosure under the Freedom of Information Act involving I.R.S. actions on decisions (A.O.D.'s), general counsel's memoranda (G.C.M.'s), and technical memoranda.

A.O.D.'s are documents that contain the reasoning of the I.R.S. behind its decision to appeal or not to appeal a given court decision and whether to acquiesce or not acquiesce. They also explain why the I.R.S. decides these issues as it does and include comparisons with other cases forming the I.R.S. litigating position on the given issues. G.C.M.'s are in-depth analyses by the Office of Chief Counsel of the legal issues presented in various forms, such as rulings to be published, requests for ruling, or questions from the commissioner. Once the Office of Chief Counsel issues a G.C.M., any related G.C.M. is retained and indexed since it serves to explain the decision announced in the ruling in question. The index and the G.C.M.'s are consulted by I.R.S. personnel when deciding similar issues. Technical memoranda are analyses prepared by the Office of Chief Counsel in connection with Treasury Regulations. They provide a detailed explanation of each portion of the regulation.

In response to the F.O.I.A. request, the I.R.S. reportedly notified Tax Analysts that it was reviewing its disclosure policies with regard to release of the A.O.D.'s, G.C.M.'s and technical memoranda and requested suspension of the normal F.O.I.A. timetable, which would have required a decision within ten days of the initial request or would permit an appeal from the *de facto* rejection of the request. Tax Analysts wrote on August 3 to Commissioner Jerome Kurtz suggesting postponement for a reasonable period of time. Tax Notes, Volume V, Issue No. 32 at 3 (August 8, 1977).

As noted by Thomas F. Field, executive director of Tax Analysts: "The public availability of rulings insures that really important Internal Revenue Service decisions—like the still unpublished production payment rulings of the late 1960s—will not in the future be shrouded in secrecy. That, in turn, will lessen the temptation to use the rulings route to implement sensitive or controversial decisions, rather than the regulatory approach with its opportunity for public comment." Tax Notes, Volume V, Issue No. 27 at 30 (July 4, 1977).

Section 6110 of the Tax Reform Act of 1976 went a long way toward removing the shroud of secrecy. Tax Analysts' recent Freedom of Information Act request is another positive step in that direction. ▲

Retirement and You

by Theodore Voorhees

The Retirement Transition

FROM THE POINT of view of all interested parties—retiree, family, friends, clients, law firm—it is desirable that the last year of active practice be a highly satisfactory one. It is a period during which the retiree adjusts to the idea of a new lifestyle, the clients' matters secure new handling, and the firm rearranges case loads and responsibilities.

It should be obvious to prospective retirees that they must do their best to make the takeover of their legal affairs work smoothly. If they are members of firms that have a pension plan, common decency and loyalty will demand that the retirees try to ensure that clients will be happy with new arrangements and will want to continue to retain the firm.

If the retiree is a sole practitioner and is turning over clients to another lawyer or firm, it is equally important that they be content with their new counsel. Retirees hope eventually to be paid for the work for which they have not been compensated at the termination of their practice. If the successor does not serve the clients satisfactorily, they may drift away, and chances of being paid for unfinished work may be lost.

Thus, common sense should require that retiring lawyers make a clean and carefully prepared transfer of clients and work load, that they brief their successors regarding cases and the problems of clients, and that they permit new lawyers to start handling matters at an early date.

The Extent of Co-operation

The scope of the following observations should be made clear. The views expressed herein have bearing only on the conduct of the lawyer who is actually approaching retirement. They will hold no interest for the person who might be referred to (not contemptuously) as a pseudoretiree, that is, one who intends to cut back to thirty hours a week and to "keep a hand in."

Some retiring lawyers will work conscientiously with their juniors in striving for an easy transfer of their work. Despite the self-evident desirability of having all parties work together harmoniously, other retirees may prove less tractable. However good the intentions of all, it is to be anticipated that some friction may develop and that a retiree's last year may be less than a completely happy one.

The finger of blame may perhaps be pointed toward other lawyers in the firm. Some of them may be inconsiderate and overaggressive in taking over the clients and case load. There may be an insensitivity to the retirees' problems, too little appreciation of their past contributions, and too casual an attitude toward the sacrifice they believe they are about to make. If, in fact, the firm fails to pay careful heed to all arising problems, it must at least share the responsibility if there is ensuing grief when retirement time approaches.

Yet any failure to achieve co-operation and a smooth transition is more likely to lie at the retiring partner's door. Some lawyers will exhibit a determination to do all in their power to hang on forever. They may hope that by continuing their ties with clients, their indispensability may be recognized and bar the need for their retirement. There may be illusions that the firm is considering making exceptions and asking them to stay on. Many lawyers detest the idea of retirement, believe that it is unnecessary and demeaning, and decide to fight it all the way.

In any firm with good judgment and self-respect, it will be a fight that aging lawyers cannot win. Yet their attitude, however irrational, should be understandable to the partners, who should not be unsympathetic. They must realize that the retirees are going through a trying and unsettling experience.

The Psychological Problem

Let's look at the hypothetical case of Andrew Apprehensive.

In the last years before retirement, he is apt to perceive that his competitive position within the firm is slipping. That may seem to him to be unfair, since he is not likely to be aware of or admit to any lessening of his intellectual powers. While younger lawyers generally remain deferential, there may be a slightly different quality to their politeness. They still listen to his words of advice but somewhat impatiently and without a showing of being convinced.

Clients may take greater care to preserve the amenities, but he may notice a willingness on their part to heed the advice of the younger members of the office. To him, there may seem to be overemphasis by other partners on the desirability of having work done by younger lawyers whenever possible in order to hold down expenses to the clients. Partners may intrude into matters within his own practice in a way that would have been unthinkable only a few years before.

Although anxious to attribute it to his own imagination, he may develop an uncomfortable feeling that people in his office are thinking about his retirement and wondering how much longer he intends to stay on. Every ounce of his intestinal fortitude and every instinct growing out of his competitive experience as a lawyer may make him resist any of these thoughts with all the vigor at his command. His primary method of doing so may be to ignore the whole subject of retirement and to act as though its day will never come. This mental attitude does not lend itself to a spirit of determined co-operation.

Occasionally the lawyer who is heading toward retirement may go further, however, and resort to stratagems to conceal the slightest evidence of his aging process. Certain signposts may become evident.

For instance, Andrew may start coming to his office earlier and staying later in a determined effort to convince others, as well as himself, that he is busier than ever. He may show resentment if anyone suggests that he should "start taking things easier," and even more so if a partner wants to know "what he's been up to."

He may tend to overparticipate in firm discussions, maintaining the prerogative of a senior partner to express his views on all matters of policy. Instead of contenting himself with a simple "yea" or "nay," he may slide into an intricate explanation of his position, motivated by a desire to prove that his judgment is still sound.

He may demonstrate an oversensitive reaction when a new arrangement for the division of firm earnings is brought on for discussion. Fearing that someone may suggest that his share is too large, he may, in a seeming burst of generosity, propose immediately that he take a cut in percentage, although making it small enough to avoid any implication that he believes his usefulness to the firm to be in any way impaired.

He may try to avoid any legal engagement which might present him in a bad light—an intricate court case, any matter involving laborious detail, or problems posing complex issues of law. He may then plead a conflicting engagement or the burden of other matters but may leap toward opportunities for a simple court appearance, a preliminary meeting with a new firm client, or other occasion when he can demonstrate his urbanity, charm, and alertness.

If obliged to meet with a client and face questions requiring up-to-date knowledge of the law, he may protect himself by having a younger lawyer with him. Whether or not he is fully briefed by the latter, Andrew is likely to be querulous if, in the presence of others, the younger man should have the temerity to express his own view.

Underlying his overworked pride may be his desire to maintain his dignity, distinction, and self-respect as an experienced, trustworthy lawyer. Yet, in addition to the disservice that his stiff-necked attitude will cause his firm and clients, he may be doing inestimable injury to himself. By refusing to come to grips with the drastic change that retirement has in store for him, he may be rushing blindly into it without preparation and with considerable likelihood of eventual unhappiness for himself.

No one is really fooled by his false pretenses, unless perhaps it is Andrew and his wife. He may not discuss retirement with her, for she may also have pretensions of youthfulness, and these are certainly not encouraged by her husband's impending fate. His partners and associates are not likely to be deceived by his air of endless activity. They know full well that he faces an approaching deadline, even if not informed as to the exact date. They are also likely to be aware of attempts being made to reassign his work.

It is true that, outside his office, other lawyers, friends, and acquaintances may not be advised of his approaching retirement and may express surprise when his axe finally falls. Later on he may wonder why their earlier ignorance of his changing status should have proved such a source of satisfaction to him.

His clients may be a different story. He may consider the year before retirement to be his last good one and want to make his relationship with his clients as pleasant as possible—unhampered by discussions of who is to handle their affairs when he passes out of the picture. A realization may come to him later that his resistance to an orderly takeover may have deeply hindered their best interests and placed a blight on his last year as well.

If he is un-co-operative, his partners will try to remain friendly but scarcely can avoid resentment. They may wonder why Andrew cannot face up to the fact that he, like most of his contemporaries must give up practice at an appointed age, and they may question why he seems unable to behave in a normal, civilized manner. It is important for them to exercise patience, taking full note that he may be laboring under psychological pressures. It is, of course, much more important that he himself realize it and try to face up to it.

The Months Following Retirement

If, during the months before retirement, Andrew tries to avoid open discussion of the termination of his practice, his distaste for the idea may become so ingrained that when he leaves his office, his sole recourse may be to enter into his shell.

His reticence during the prior months may make it increasingly difficult for him to talk to his wife about where they now stand. He can scarcely blame his partners if his earlier avoidance of disclosure of his future plans has caused them to lose further interest. He may likewise find it late in the game to try to regain the sympathy and respect of his clients, from whom he may have walked away with little more than a good-bye. If his attitude during his last twelve months of practice has been consistently negative, he may wake up and wonder how he could have been so stupid as to end his career on such a thoughtless and essentially selfish note.

Of course, it is never too late for him to turn around and try to rescue his remaining years from disaster. He must smash his psychological block about retirement. He should force himself to acknowledge that he is no longer a practicing lawyer and to make sure that all interested parties are aware of his change of status. All his cards should be placed on the table before his wife, and they should enter into serious, even if belated, planning for their future. Amends should be proffered his partners, primarily by making his break with his office civil and clean.

He should acknowledge his retirement to other lawyers, clients, friends, and acquaintances. He may find this difficult but should try to do it without embarrassment. Above all, he should acknowledge to himself that his day as a lawyer is now wholly behind him and that a new and entirely different type of life lies ahead. He should insist to himself that he has the fortitude to make that life a good one.

Any remaining vestige of resentment must be eradicated. If he has taken on a resemblance to a hangdog, he must get rid of it. After all, he has devoted to the practice of law only the best days of his life so far. Even better ones and new accomplishments can be found in the years ahead. Since he still has all the talents he exerted at the bar, he should have no doubt as to his ability to make his new life fruitful and successful.

The foregoing is by no means intended as descriptive of all—not even many—retiring lawyers. Since all of us are human, however, most retirees probably display some of the symptoms set forth above, and some words of caution to aging lawyers might help them during their period of transition. ▲

Handicap Discrimination Seminar to Be Held in December

ANDERSON PUBLISHING Company will sponsor a handicap discrimination seminar on December 5 and 6 in the Washington, D.C., area at Stouffer's National Center Hotel in Arlington. The seminar will feature practical and legal aspects of the Rehabilitation Act of 1973.

The fee for the seminar is $250. The faculty includes Andrew J. Ruzicho, a lawyer with General Tire and Rubber Company; J. Stanly Pottinger, former director, Office of Civil Rights, Department of Health, Education, and Welfare; Walter T. Coonan, deputy assistant regional administrator, Office of Federal Contract Compliance Programs; Louis M. Thrasher, director, Office of Special Litigation, Civil Rights Division, Department of Justice; and Annette Friborg, director, Human Resources and Employment Opportunity, National Association of Manufacturers.

Further information may be obtained from Gloria Jones, Anderson Publishing Company, 646 Main Street, Cincinnati, Ohio 45201 (telephone 513/421-4142). ▲

Current Legal Literature

by Arthur John Keeffe

Walker Lewis Recounts Some Maryland History

THE Maryland State Bar Association persuaded its scholar in residence, H. H. Walker Lewis, to do a history of the United States District Court for Maryland. Write the association at 905 Keyser Building, Baltimore, Maryland 21202, and send six dollars.

Walker Lewis is well known to readers of this *Journal* from his many articles, but he is best known for two fine books—*Without Fear or Favor: A Biography of Chief Justice Roger Brooke Taney* and *Daniel: Life of Webster in His Own Words*—both published by Houghton Mifflin in Boston, the first in 1965 and the second in 1969.

As Chief Judge Edward S. Northrup says in his foreword to this ninety-eight-page paperbound book, Lewis's approach is "refreshing" as he "sprinkles" anecdotes throughout. These anecdotes make the various district judges live, "warts and all." Needless to say, Lewis wisely confines his anecdotes to judges who have died. Besides listing the clerks, marshals, United States attorneys, and judges, the book has a splendid index that gives the names of all the people discussed and a reference to the page on which the discussion can be found.

Of the many interesting anecdotes two are outstanding. In telling us about James Houston, who served from 1806 to 1819, Lewis recalls that in Upper Marlboro in 1814 following the attack of the British on the White House, the Americans captured five British stragglers, one of whom escaped and informed the British. The main body of British troops had spent the night there. Their commander, Admiral Cockburn, had commandeered the home of Dr. William Bean in Upper Marlboro, and when they found that the doctor had assisted in the capture of the stragglers, they contended that he had violated the laws of war and took him aboard the admiral's ship as a hostage. The British demanded that the four stragglers be returned or they would "lay the entire town in ashes."

The townspeople met the situation as courageously as the Duke of Plaza in *The Gondoliers*. They routed John Hodges out of bed, directing him to find and return the four prisoners. He did. To the townspeople, Hodges was a hero; to the colonists, a traitor. A grand jury in Baltimore indicted him for treason, and he went on trial before United States Supreme Court Justice Gabriel Duvall and Houston. Duvall instructed the jury that the mere release of the prisoners by Hodges was sufficient proof of his treasonable intent. But Houston said that he disagreed and that the jury was the sole judge of the law and facts. They took his hint and immediately returned a verdict of not guilty.

Francis Scott Key and John Stuart Skinner had led a successful mission to free Dr. Bean. All three, however, were detained on board long enough to have a grandstand view of the bombardment of Fort McHenry, which inspired Key to write the lines that are now our national anthem.

Lewis also recalls District Judges Theodore Bland (1819–24) and Elias Glenn (1824–36). As we all know from *McCulloch* v. *Maryland*, 4 Wheat. 316 (1819), McCulloch was the cashier of the Baltimore branch of the Bank of the United States, but until I read this book I did not realize that the Supreme Court misspelled the poor fellow's name. Lewis says he spelled it "McCulloh." There is a street in Baltimore named

WINGTIPS . . . . . by D. E. Abraham

after him and spelled correctly.

In *Etting v. Bank of United States*, 11 Wheat. 59 (1826), the Bank of the United States sued on $200,000 of notes that McCulloh gave to cover money he owed to the bank. Because McCulloh was a poor man, the bank accepted notes in batches of $12,500 endorsed by rich Baltimoreans like Etting. Because McCulloh was cashier, these men felt they were obliged to assist. On May 17, 1819, the bank's committee accepted the notes as satisfactorily endorsed, and on May 18 the directors of the bank fired McCulloh.

The United States Circuit Court for Maryland, with Bland and Duvall presiding, held Etting and the others to their bargain.

On appeal, the Supreme Court, in an opinion by Chief Justice Marshall, upheld the circuit court but remanded. Walker Lewis notes, however, that throughout his opinion Marshall spells the name as "McCullough" even though the circuit court papers correctly spelled it. By the time of the remand, Elias Glenn had become United States district judge. Sitting with Duvall, however, Glenn voted for Etting, which meant the case would go back to the Supreme Court, which then had seven justices. The bank saw the handwriting on the wall and settled with Etting and the other endorsers for twenty cents on the dollar.

Is (Was?) President Ford's Pardon of Nixon Valid?

GERALD R. FORD'S pardon of former President Nixon received plenty of publicity at the time, but a piece in the *William and Mary Law Review* is the first in-depth analysis I've seen of the presidential pardon power in general. The author of this constitutional history is William F. Duker, a Ph. D. candidate at Cambridge University. Write to Williamsburg, Virginia 23185, with $3 for a reprint of this spring, 1977, issue.

As might be expected, this power, incorporated in Article II, Section 2, of the Constitution, has its roots in early England. Its chief proponents at the 1787 Constitutional Convention were none other than Charles Pinckney, Alexander Hamilton, and John Rutledge. Because of the generality of the language of this provision, it was left to the courts more precisely to interpret the power "to grant reprieves and pardons for offenses against the United States. . . ."

In *United States v. Wilson*, 32 U.S. 150 (1833), Justice Marshall viewed the pardon as "an act of grace," but *Biddle v. Perovich*, 274 U.S. 480 (1927), saw it as a determination by the "ultimate authority" that the public welfare would best be served by granting the relief.

There have been further decisions construing the extent of the pardon power. By the terms of the Constitution, impeachments are specifically excluded. Less clear is the matter of whether the president can pardon contempts of court, the question at least being tentatively resolved in the affirmative in *Ex Parte Grossman*, 267 U.S. 87 (1925).

After painstakingly tracing the history of the pardon power and its implementation, Mr. Duker reaches the pardon of President Nixon. It will be recalled that President Ford's pardon applied, without specification, to "all offenses" committed by Mr. Nixon against the United States during his term in office.

This leaves open the question whether a pardon that does not specify an offense is valid. Looking again at the English roots of this power, Mr. Duker builds an interesting case for the invalidity of the Nixon pardon. This pardon also heightens our awareness of the unfettered nature of the pardon power, since "neither the Congress nor the courts can question the motives of the President" in its exercise. For this reason Mr. Duker feels that of all the powers in our tripartite system, this one holds the most potential for abuse.

Mister Vice President Pro and Con

JOHN NANCE GARNER, who thought the vice presidency was worth a "bucket of warm spit," would have been stunned to see the Fordham Law School as the scene of a symposium on the subject. That was the case, however, in December, 1976, when the school was the site for a meeting of the American Bar Association's Special Committee on Election Reform. The proceedings are printed in a February, 1977, special issue of the *Fordham Law Review*. Write to 140 West Sixty-second Street, New York, New York 10023, with $3.50 for a reprint.

The symposium sported an impressive line-up of participants, United States senators Birch Bayh and Robert Griffin, historian Arthur Schlesinger, Jr., and N.A.A.C.P. director Clarence M. Mitchell, to name just a few.

The group focused on three areas: selection of vice presidential candidates, conduct of the office, and alternatives to the office. On the latter subject, Senator Bayh was very much the realist by urging that we abandon the notion that the vice presidency should be regarded as a "functioning office indispensable to the running of the government." The only role for the vice president, as he sees it, is to serve as president, and in light of that role the focus should be on how to prepare him better for possible assumption of that responsibility. One way would be to expose him to more of the operations of the presidency rather than making the vice presidency a more responsible position.

Mr. Schlesinger, however, argues that the vice presidency is a "humiliating, frustrating and in many cases a deeply demoralizing experience" that may even have an adverse effect on an individual's qualifications to be president. He urges that the vice presidency be abolished and that an acting president—perhaps the secretary of state—serve for a short period of time until a new president is chosen in a national election.

There was plenty of this give and take among the participants in the symposium. Nevertheless, the members of the committee, chairmanned by John D. Feerick of New York, did reach some conclusions and recommendations included in the Fordham publication. The committee recommended that the vice presidency in its present form be retained but urged that each president involve the vice president "intimately and productively in operations of the presidency."

As for the manner of choosing the vice presidential candidates, the committee favored retention of the present practice of having the presidential nominee recommend his choice to the nominating convention. It also urged that aspirants for the presidential nomination announce in advance a tentative list of vice presidential possibilities and that during the final campaign there be televised debates by the vice presidential candidates.

An appendix to this issue is "Overview of the Vice Presidency," by Joel Goldstein, a Rhodes scholar studying the vice presidency from his vantage point at Oxford.

Can Noerr Be Ignored?

SOME HINTS of warning to the American Bar Association and its defense of the Justice Department's pending antitrust suit appear in the winter, 1976, issue of the *Antitrust Bulletin*. The author is Charles A. Bane of the Illinois bar. His piece is only ten pages long, but it appears that copies of this issue cost $15 from 95 Morton Street, New York, New York 10014. Perhaps your best bet would be to write to him and ask for a reprint. His address is One First National Plaza, Chicago, Illinois 60670.

Mr. Bane sees the Association raising the antitrust defense provided by *Eastern Railroad President's Conference* v. *Noerr Motor Freight*, 365 U.S. 127 (1961), but at a time when the *Noerr* doctrine has suffered some erosion. The *Noerr* case arose out of a truckers-railroads fight in which the former sued the latter for their tactics in persuading the governor of Pennsylvania to veto a so-called fair truck bill. In finding nothing illegal about the railroads' actions, the Supreme Court stated the principle that "no violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws."

In *California Motor Transport Company* v. *Trucking Unlimited*, 404 U.S. 508 (1972), the Court backed off a bit from *Noerr* by finding that the purported attempt to influence the government was a mere sham for usurping the decision-making process to the disadvantage of competitors. The American Bar Association's position has been that its actions to prohibit price and other advertising by the Code of Professional Responsibility are merely an exercise of its right to petition various states to enact the code.

Mr. Bane sees some problems in this stance in light of *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, and the California trucking case, which support the conclusion that the right to petition is protected from antitrust laws "only when it asks for affirmative, sovereign state action." In *Goldfarb*, for example, the Court found that nothing in the state supreme court rules required the antitrust competitive activities—the establishment and enforcement of minimum fee schedules.

Having said all that, I think you'll see why Mr. Bane's title is a clever and good one: "Truckin' on Down to the American Bar Association, or Can Noerr Be Ignored."

When Japanese Americans Were in Concentration Camps

IT WAS a curious mentality that swept through the United States and Canada after the bombing of Pearl Harbor and resulted in the internment of thousands of Japanese Americans and Japanese Canadians. Twice the United States Supreme Court sustained the constitutionality of the legislation and executive orders that authorized these actions. The same was true of Canada's Privy Council.

Yet twenty-five years later former President Ford stated: "We now know what we should have known then—not only was that evacuation wrong, but Japanese Americans were and are loyal Americans."

A scholarly recitation of these wartime actions in both the United States and Canada appears in the March, 1977, issue of *Les Cahiers de Droit*, the publi-

cation of the law faculty of Québec's Laval University (Pavillon de Knonick, Cité Universitaire, Québec 10e, Canada).

Although "Je parle français un peu," I didn't translate this article. In fact, it's written in English, with a summary in French, and the author is Edward G. Hudon, former law librarian at the United States Supreme Court who is now a law professor at Laval. Professor Hudon reviews the anti-Japanese actions in both the United States and Canada and then analyzes the court tests in both countries.

In this case hindsight is its usual 20/20. Professor Hudon comments, "It should be remembered that at the time the internment of persons of Japanese ancestry took place during World War II in both the United States and Canada, there were strong and influential voices that expressed full support for the now lamented event that was taking place." As he says, on the American scene one of the strongest voices was that of Earl Warren, then attorney general of California. He could have included Walter Lippman and the late Tom Clark. And he states that "organized public opinion in British Columbia was more anti-Japanese than ever."

These actions confirm the belief that "in times of stress and grave national emergency, even the most rational and the fairest of men can forget the rights of others and do strange things."

Evaluating Frank Murphy in 1977

PERHAPS because he came to the Supreme Court via the direct political route, or perhaps because his views were so far ahead of his times, Frank Murphy's tenure on the Supreme Court was not highly touted at the time of his death in 1949. There seems to be a reappraisal afoot, however, and this will be greatly aided by an article in the spring, 1977, *Detroit College of Law Review* entitled, "The Neglected Opinions of Mr. Justice Murphy" (130 East Elizabeth Street, Detroit, Michigan 48201; $3). The author is James R. Kerr, professor of government at Southern Illinois University.

Murphy served as mayor of Detroit and then as governor of Michigan. On his defeat for re-election, he was appointed United States attorney general in 1939 and to the High Court a year later.

Harold Norris of the University of Detroit Law School, who has written a book on Justice Murphy, states in a prefatory note that the justice was a "considerable prophetic influence in the nationalizing of the Bill of Rights." Looking at Murphy, warts and all, Professor Kerr notes, "If one judges Murphy according to the skill with which he discusses and manipulates precedents, procedural niceties, history, custom, statutory construction, and intent of the framers, his performance is only average." He hastens to add, however, that Murphy can be judged "in terms of how foresightful he was in devising judicial dogma which promised genuine equality, justice, and liberty for all Americans."

Professor Kerr sets up two goals for his article. First, he wants to determine whether Murphy created a judicial legacy of constitutional and legal doctrine that was slighted or unacknowledged by the authors of opinions during the "Warren Court" years. Second, if Murphy has been neglected, he wants to determine the causes of this neglect.

In working on his first goal, Professor Kerr analyzes the justice's contribution in four areas: racial discrimination; criminal justice; separation of powers; and freedom of speech, press, and association. In the area of criminal justice, for example, Professor Kerr notes that Justices Black and Douglas joined in few of Murphy's dissenting opinions in the 1940s, but by the 1960s these two, plus Justices Brennan, Goldberg, and Warren, were expressing views with "striking parallels" to Murphy's dissents.

A Murphy dissent in *Adamson* v. *California*, 332 U.S. 46 (1947), stated that the Bill of Rights should be incorporated totally into the due process clause of the Fourteenth Amendment but that due process could include additional rights not set out in the Bill of Rights. This position, called "eccentric" at the time, nevertheless emerged twenty years later in cases such as *Griswold* v. Connecticut, 381 U.S. 479 (1965), in which the Supreme Court spoke of emanations and penumbras to the Bill of Rights, and in *Katz* v. *United States*, 389 U.S. 347 (1967), when it noted that the Fourth Amendment embraced a generalized right of privacy.

As for the neglect of Murphy's opinions, Professor Kerr offers two theories. First, there were "institutional constraints" on Murphy's influence, primarily his relatively short tenure on the Court and the low esteem in which he was held by the two chief justices (Stone and Vinson) under whom he served. Second, there were "substantive constraints" on the potential influence of Murphy's opinions. His opinions were generally short and the issues often simplified, and he often "stressed the moral component to such a degree that his colleagues refused to join his concurrences or dissents."

Despite the neglect brought about by these and other constraints, Professor Kerr writes that "the spirit of Murphy's opinions stands alive like a phoenix bird beckoning, inspiring lawyers and judges."

Settle by Obtaining an Annuity

I'VE mentioned before the *El Paso Trial Lawyers Quarterly*, the handy journal featuring none other than a gavel and spurs on the cover. A recent

article that caught my eye deals with an increasingly popular manner of settling catastrophic personal injury cases. The device is the annuity settlement that typically involves a cash payment "up front" and further annual payments during the plaintiff's life.

The article appears in Volume III, Number 2 (Box 888, El Paso, Texas 79945; $2). This piece by John J. O'Connor, Jr., of the Maryland bar first appeared in the *American Trial Lawyers Association New Jersey News* for September–October, 1976.

The cost savings to the defendant are among the factors aiding the popularity of this manner of settlement. A California case, for example, involving a young girl rendered a paraplegic, would have yielded $26 million in annuity payments to the plaintiff if she had lived her full expectancy. Yet the cost of the single payment annuity was only $430,000. A statutory provision nevertheless is necessary to permit a jury to return an annuity verdict since the "single recovery rule" is deeply embedded in our tort system. Where there is no statute of this type, the annuity award must be a settlement-oriented device.

The award also has appeal to the typical plaintiff, unsophisticated in investment techniques for major sums of money, and the author points out that payments to a plaintiff under an annuity arrangement are accorded the same no-tax treatment under federal law as a lump-sum payment.

The article has numerous other practical suggestions on utilizing an annuity settlement, and it's concluded with a fine bibliography and a sample agreement.

Applying the Sherman Act Overseas

THE WORLD of antitrust will have a literary treat on the publication of a new treatise by no less a scion than Earl W. Kintner, Washington practitioner and former general counsel and chairman of the Federal Trade Commission.

A taste of his new work is available in the January, 1977, *Boston College Industrial and Commercial Law Review* through an article on jurisdiction over foreign commerce under the Sherman Act. Write to 885 Centre Street, Newton Centre, Massachusetts 02159, with $3 for this issue. Earl's coauthor, based on a chapter in the treatise, is Joseph P. Griffin, a colleague in his Washington law firm.

I hasten to add that theirs is just one of two fine Sherman Act articles in this issue. The other is "'Dirty Tricks' and Section One of the Sherman Act: Federalizing State Unfair Competition Law," by Michael J. Hutter, assistant professor of law at Albany Law School.

The Kintner-Griffin piece opens with "Few aspects of the Sherman Act have generated as much controversy over such an extended period as its application to 'trade or commerce . . . with foreign nations.'"

The focal point of the controversy is the question of jurisdiction—the extent to which the power of the United States judiciary is to be asserted over commercial and trade activities that involve foreign elements.

After reviewing the legislative history of the Sherman Act, the authors examine the types of foreign commerce that are constitutionally reachable and the relationship that a restraint on trade must have to foreign commerce in order to support legislative jurisdiction. They then explore the impact of extraterritorial conduct on the jurisdictional issue and conclude with an analysis of certain specific defenses usually available only in foreign commerce cases. This is high quality scholarship that augurs well for Mr. Kintner's forthcoming treatise.

Professor Hutter deals with the attempts on the part of plaintiffs to bring state unfair competition cases within the scope of conspiracies banned by Section 1 of the Sherman Act, thus opening the possibility of treble damages, attorneys' fees, and use of the federal forum. The benefits of this stratagem to plaintiffs thus are clear. But as a result the federal court dockets would become even more crowded, and "the federal antitrust laws would, in effect, subsume a large body of state law, creating thereby a judicially declared federal common law of unfair competition."

The author submits that on the federal jurisdictional question a broad view is the sounder view—that conspiracies involving unfair competitive practices may indeed be subject to antitrust liability. Once that stage is reached, however, he urges that a rule of reason rather than a per se rule be applied to evaluate these cases.

Jon Van Dyke Previews Bakke

THE California Supreme Court, so often an enlightened beacon to other courts, may have nodded in one of its recent opinions when it struck down a racially based affirmative action program at the University of California at Davis.

At least that's the view of Hastings law professor Jon Van Dyke, former law clerk to Chief Justice Roger Traynor, who wonders in the *Hastings Constitutional Law Quarterly* how that learned body could take such a position "when logic, experience, and the reasoned judgments of so many judicial and legislative decisionmakers all concluded that these programs are necessary." Professor Van Dyke's commentary appears in the fall, 1976, issue, available for $3.50 from 198 McAllister Street, San Francisco, California 94102.

The decision in question is *Bakke* v. *Regents of the University of California*, 553 P. 2d 1152, in which the court held unconstitutional the special admissions program of the Davis medical school. The school's policy was to reserve sixteen of a hundred spaces in the entering class for special admission applicants.

Professor Van Dyke points out that racially based affirmative action programs were adopted originally because the continued underrepresentation of nonwhites in professional schools was viewed as a species of racial discrimination that violated the Fourteenth Amendment. He claims that the majority in *Bakke* "ignores that original purpose." He is particularly disturbed by the court's conclusion that rejected, but "qualified," white applicants are injured by the mere existence of a racially based affirmative action program.

In the author's view this conclusion flies in the face of reality since no one has ever contended that admissions criteria could be "articulated so carefully that an applicant meeting them would automatically be entitled to admission." Rather, the admissions process is necessarily subjective.

Juxtaposed on Professor Van Dyke's views is another commentary on the same subject by Larry M. Lavinsky, a member of the New York bar and chairman of the National Civil Rights Committee of the Anti-Defamation League of B'nai B'rith. Mr. Lavinsky maintains that the assumption has never been proved that affirmative action programs can succeed in producing qualified professional people in large numbers. Even if the assumption were true, he wonders whether it's worth the high social cost since, he claims, these programs "exalt immutable birth characteristics, stigmatize those preferentially admitted, and victimize those excluded because of their race." He urges that more research be conducted to develop "a real body of

(Continued on page 1498)

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1155 EAST SIXTIETH STREET, CHICAGO, ILLINOIS 60637
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The objects of the American Bar Association, a voluntary association of lawyers of the United States, are to uphold and defend the Constitution of the United States and maintain representative government; to advance the science of jurisprudence; to promote throughout the nation the administration of justice and the uniformity of legislation and of judicial decisions; to uphold the honor of the profession of law; to apply the knowledge and experience of the profession to the promotion of the public good; to encourage cordial intercourse among the members of the American Bar; and to correlate and promote the activities of the bar organizations in the nation within these purposes and in the interests of the legal profession and of the public. Through representation of state, territorial, and local bar associations and other legal organizations in the House of Delegates, the Association endeavors to reflect, so far as possible, the objectives of the organized bar of the United States.

Any person of good moral character and in good standing at the bar of a state, territory, or possession of the United States is eligible to be a member of the Association. An application for membership should be accompanied by a check for dues in the appropriate amount as follows: $100.00 for lawyers first admitted in 1962 and before; $80.00 for lawyers first admitted between 1963 and 1967 (both years inclusive); $40.00 for lawyers first admitted in 1968, 1969, 1970, 1971, or 1972; $20.00 for lawyers first admitted in 1973, 1974, or 1975; and $10.00 for lawyers first admitted in 1976 or 1977. The subscription price of the *Journal* ($3.00) is included in the dues.

There are twenty-two sections and three divisions within the Association. Membership in the Law Student Division is limited to law students and in the Young Lawyers Division to members under 36 years old. All members are eligible for the Judicial Administration Division and other sections, which have dues as follows:

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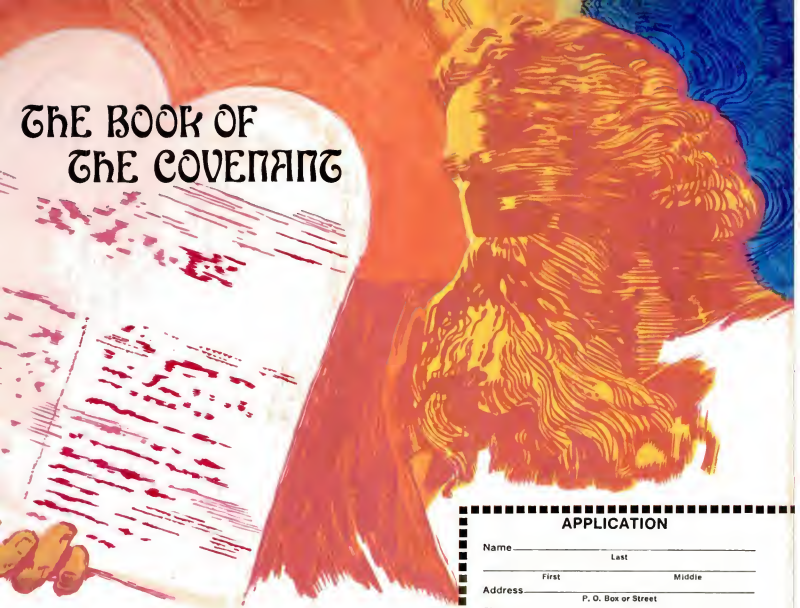

TABLETS FROM MT. SINAI . . . WHEN THE LAW OF GOD AND THE LAW OF THE STATE WERE *ONE*.

Moses, Hebrew prophet and law-giver (1576-1456 B.C.) carried down from Mt. Sinai "two tablets of stone, writ by the finger of God." Inscribed in the Torah, this Book of the Law combined the "higher law" of God with the civil law of Israel. A covenant between Jehovah and the people, it promised His blessings and protection in return for their faith and obedience.

The Book of the Covenant was one of the earliest humanist codes. It decried murder, theft and false testimony. It inspired respect for elders, women and family life, and was first among early laws to prescribe good treatment of strangers and foreigners.

Founded on "the Laws of Nature and of Nature's God," our nation early espoused a separation of church and state. Yet the tenets of "higher law" still pervade our common law in its concern for individual rights and public good. That's how the American Bar Association, more than 200,000 lawyers strong, can encompass every faith and creed—why it is deeply engrossed in legal aid to the aged, legal aspects of artificial parenthood, law and the mentally disabled and other urgent contemporary issues. Help in these pursuits.

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experience" on whether special admissions based on an applicant's economically disadvantaged status would be more effective than one based on an applicant's racial status.

The United States Supreme Court granted certiorari in the *Bakke* case. Perhaps the decision in this case will answer questions left hanging by the High Court's 1973 decision, or nondecision, in *DeFunis v. Odegaard*, 416 U.S. 312 (1974).

A Bill of Rights May Awaken in Tasmania

WE DON'T give widespread coverage to Tasmania, but that's not to say there isn't a legal periodical down there worth noting. I speak of the *University of Tasmania Law Review*, and Volume 5, Number 2, is now before me. Write to Box 252c, Hobart, Tasmania, Australia, for back issue prices and other information.

The lead article in this issue is particularly worthy as it is a reprint of the E.W. Turner memorial lecture delivered at Hobart in late 1976. The speaker-author is Justice M.D. Kirby, chairman of the Law Reform Commission of Australia. His topic: "Human Rights, The Challenge for Law Reform."

The justice's speech was as much as anything a call to action to bring Australia into step with much of the rest of the English-speaking world in the area of human rights. It is with much concern, for example, that he reports that the human rights debate, although "not dead" in Australia, nevertheless "slumbers, fitfully."

While in England, Canada, and New Zealand the human rights issue "is the focus of public and learned controversy," in his own country "the issue becomes unnecessarily enmeshed in the toils of partisan politics."

The debate down under recently centered on attempted ratification by the Australian Parliament of the International Covenant on Civil and Political Rights. Ratification failed, but Justice Kirby seems less troubled over that than he is over the fact that Australian debate over the convention and a bill of rights, which Australia does not now have, has often been "pedestrian" and at a "banal" level.

While other nations take part in the international movement for court-enforced, guaranteed civil rights through the adoption of either international or national bills of rights, Justice Kirby reports that the approach in Australia has been piecemeal. At the same time he is concerned that Parliament cannot best solve on an *ad hoc* basis the civil rights problems coming to the fore. A generalized bill of rights, on the other hand, would arm judges with new weapons to deal with wrongs in society. His own Australian Law Reform Commission clearly has a role to play here, and it has noble goals of enlisting public concern and involvement "to add flesh to the human rights asserted in the international covenant."

Justice Kirby's thoughts are moving and praiseworthy. That his is not a voice crying in the desert is indicated in an editor's note that, following his talk at Hobart, the government decided to establish a Human Rights Commission. Among other things, this panel will analyze all Australian laws with an eye to their consistency with the international covenant.

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Ad Finem

An Ode to Judicial Temperament

The day may start in the usual way
with hearings set throughout the day,
or perhaps you've had a midnight call
to sign a warrant, or to handle all
the problems that just will not wait
for regular hours, or day to break.

Sometimes I'll take a short recess
to try to straighten out the mess.
The attorneys talk, dicker, and nudge.
"Can we have a minute, Judge?"
How often I have heard that phrase,
but what the heck, it clears the haze.

Back on the bench we'll work like crazy.
No one I know is ever lazy.
More work goes on than meets the eye;
so much so that time flies by.
It's often late before I stop;
home I go, in bed I flop.

On motion days my courtroom's stacked;
standing room only ... it gets that packed.
I'll see how much we can get done
without "short changing" anyone.
Some come to watch, make notes, and learn;
others, "I'm next," their main concern.

On weekends, too, we're called to do
advisories "So what else is new?"
There's no day off when it comes to crime,
and some judge has to take the time
to advise them what they need to know
when you feel like telling 'em where to go!

The variety of work is never ending;
some good, some bad, and some heart-rending.
Adoptions are my favorite ones;
the joy and happiness that always comes,
their faces beaming full of pleasure
for the new parents, another treasure.

I've no complaints, it's almost fun,
especially when a job's well done.
And so it goes day after day.
Some think we do it just for pay.
But me, I feel a sense of pride;
with justice served, I'm satisfied.

—ELIZABETH A. KOVACHEVICH
(Circuit Judge)
Sixth Judicial Circuit, Florida

Who Said That?

Test your knowledge by identifying the well-known persons who recently made these statements. Don't look too quickly, but the answers are below — and upside down.

1. "It's not easy wearing three hats, especially in my case; I have only two heads."

2. "I can't understand why I don't have a book. I think the publishers are under the impression I'm just a mother defending her son. . . . This is not an ordinary case and I'm not an ordinary person."

3. "Let me get a poke at him. I hope they stuff a Roy Rogers hamburger down his throat."

4. "This is a great country where anybody can grow up to be president — except me."

Answers

1. Marty Feldman, who wrote, directed, and acted in *The Last Remake of Beau Geste*. 2. Marguerite Oswald, mother of Lee Harvey Oswald. 3. Roy Rogers, after a youth hit him in the face with a pie at the opening of another in the chain of Roy Rogers family restaurants. 4. Barry Goldwater in an appearance on a "Laugh-in" special on N.B.C.

Brennan's Legal World

"The Texan in the jury box said he'd carry out the sentence!"

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Is this accident covered in the car owner's no-fault policy?

WORDS and PHRASES helped the court with this case . . . let it help you with your next one

A recent case, 357 A. 2d 836, involved a guest passenger of an automobile who left the car to watch a service station attendant add water to the radiator. As the radiator was being filled, a sudden explosion and fire injured the guest.

The car owner's no-fault insurance policy will pay benefits only if:

> **The guest retained his status as an "occupant" of the car when the injury occurred.**
>
> **or . . .**
>
> **The guest attained status as a pedestrian and was injured with objects propelled "by and from" the automobile, but not propelled "off" the automobile.**

To help resolve the issues, the court turned to Words and Phrases for judicial interpretations of the words "occupant," "by" and "from."

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